

# Educability and Education: Filling the Cracks in Service Provision Responsibility Under the Education for All Handicapped Children Act of 1975

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## I. INTRODUCTION

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity for an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>1</sup>

This country's public education system has a long and tragic history of discrimination against handicapped children.<sup>2</sup> State educational authorities have excluded many handicapped children from schools on the grounds that they were uneducable or detrimental to the general welfare and progress of other students. Those who were admitted into the system were generally relegated to inferior facilities and ineffective programming.<sup>3</sup> Congress attempted to remedy this situation by enacting the Education for All Handicapped Children Act of 1975 (EAHCA or the Act).<sup>4</sup> The EAHCA provides financial assistance to state and local school authorities to assist in the provision of special educational services to handicapped children.<sup>5</sup> The Act's primary goal is to assure that every handicapped child receives a free appropriate public education.<sup>6</sup>

Each handicapped child, depending upon his particular impairment(s), presents a unique collection of varied needs. Unfortunately, Congress was rather cryptic in specifying which needs must be addressed as "educational" needs under the Act. As a result, disputes frequently arise between advocates for the child and school districts over the types of services which must be provided as part of a free appropriate public education. School officials often take a narrow view of the concept of education and argue that educational needs are very limited in scope. They feel that educational needs must be distinguished from any needs which arise as a result of problems in the social, emotional, behavioral, and custodial areas, asserting that the latter are clearly noneducational in nature. Under this restricted view, educational services may not even be appropriate for some seriously handicapped children whose noneducational

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1. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

2. See generally THE LEGAL RIGHTS OF HANDICAPPED PERSONS 53-194 (R. Burgdorf, Jr. ed. 1980); Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855 (1975).

3. See *infra* notes 10-14 and accompanying text.

4. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1232, 1400-1401, 1405-1406, 1411-1420, 1453 (1982 & Supp. III 1985)).

5. The Act contains a formula for determining the maximum allocation each state is entitled to during any fiscal year. 20 U.S.C.A. § 1411(a) (West 1978 and Supp. 1987). These funds are not intended to meet the full cost of educating handicapped children but to assist states in their efforts. S. REP. NO. 168, 95th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1425, 1431, 1446 [hereinafter SENATE REPORT].

6. 20 U.S.C. § 1400(c) (1982).

needs are primary. The child's advocates espouse a much broader concept of education. They assert that educational needs of a handicapped child transcend the distinctions made by school officials and require a wide array of services not traditionally associated with the education of nonhandicapped children.

These educational versus noneducational disputes most often arise when the services at issue are expensive. The service which provokes the most debate is the residential placement.<sup>7</sup> School districts often maintain that if such a placement is required, it is necessitated primarily by noneducational needs. This, they argue, shifts the financial responsibility to the parents or, if the parents cannot afford the placement, to the appropriate public service agency. The parents and the potentially responsible agencies will, in turn, assert that the needs to be addressed are educational and thus the placement is the responsibility of the school district. These conflicts over the proper characterization of "educational needs," may result in a long delay or the complete denial of appropriate services to the child. Often an administrative or judicial decisionmaker is called upon to make the complex determination of whether a required placement is for educational or noneducational purposes.

This Article examines the educational-noneducational controversy focusing on residential placement disputes as a prototype.<sup>8</sup> The thesis of this Article is that Congress never intended for service provision responsibility under the Act to be based upon complex distinctions between a child's educational and noneducational needs. It will argue that such determinations cannot, in reality, be accurately made. Any such distinction is illusory and serves, in itself, to foster, instead of resolve, interagency disputes regarding service provision responsibility.

This Article will demonstrate that the Act was specifically designed to eliminate educational-noneducational disputes and the interagency buck-passing which accompanies them. It will present evidence that Congress adopted a broad view of educational needs and responsibilities; a view which was intended to collapse the traditional dichotomy between educational and noneducational needs. The Article maintains that Congress intended that even the most severely handicapped children—those historically viewed as being uneducable—be provided services under the Act to assist them in developing as total human beings, living as effectively as possible, whatever their environment. This Article will show that to achieve these objectives, Congress planned for educational services that extended well beyond those services traditionally associated with the education of nonhandicapped children. Consequently, to base educational service responsibility on the traditional distinction between educational and noneducational needs effectively defeats congressional intent. Instead, educational responsibility should be liberally construed to meet the developmental needs of even the most severely handicapped.

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7. See *infra* notes 176–79 and accompanying text.

8. The educational-noneducational controversy arises over requests for various nontraditional expensive services. This Article focuses on the residential placement as it often contains many of these disputed services within its programmatic package.

This Article will begin by examining the issue of whether all handicapped children, regardless of the severity of their impairments, are educable. It will show that Congress adopted the zero reject model of special education which considers all handicapped children capable of developing through appropriate services. With the zero reject model in mind, this Article will next consider what needs and corresponding services Congress considered educational in nature when enacting the EAHCA. This Article will approach this question by first demonstrating that the educational-noneducational controversy arose from the ambiguous statutory definition of a free appropriate public education. It will then explore the judicial and professional development of the definition of special education and argue that Congress intended the concept of special education to be construed broadly.

This Article will then examine the educational versus noneducational controversy in the context of the Act's residential placement provision. It will review the various approaches taken by administrative and judicial decisionmakers in determining residential placement responsibility under the Act. This Article will demonstrate how each such approach is in conflict with the Act's language and congressional intent, and ultimately serves to fuel further disputes. This Article will then propose a different approach to determining residential placement and other service responsibility that is consistent with both Congress' adoption of the zero reject model of special education and its broad view of the concept of education. It will conclude by suggesting an alternative method of developing and financing educational services which is more in line with congressional expectation as evidenced by the Act's legislative history.

## II. THE EDUCABILITY OF ALL HANDICAPPED CHILDREN

### A. *The Professional Development of the Zero Reject Model*

Residential placements are appropriate only for those handicapped children who require care and a highly structured environment on a twenty-four hour basis. These children include some of the most severely handicapped. An issue still being debated is whether all such children can reap any benefit from educational programming.<sup>9</sup> If it is, in fact, true that some severely handicapped children are uneducable, it would be an enormous waste of resources to require school districts to provide such services as educational residential placements for them.

The educable-uneducable distinction has its roots in the early 1900s. This notion was fostered by early American teachers when they realized that some handicapped children were not progressing within the traditional academic curriculum of "reading, writing, and arithmetic." Instead of expanding and revising the curriculum to meet the needs of these children, school officials simply characterized

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9. See generally Rothstein, *Educational Rights of Severely and Profoundly Handicapped Children*, 61 NEB. L. REV. 586, 612 (1982) (suggesting standards for determining whether an individual is educable); 1 ANALYSIS AND INTERVENTION IN DEVELOPMENTAL DISABILITIES (1981) (symposium containing articles on the educability issue).

them as uneducable.<sup>10</sup> A few states introduced formal classes for the mentally impaired but usually limited admission to high functioning retardates. Only those who succeeded in these programs were deemed educable while all other mentally handicapped children were labeled uneducable and excluded from public school attendance. Many times, such distinctions were based solely upon I.Q. test scores.<sup>11</sup>

Eventually, as special education techniques developed, it was found that children below the "educable" cut-off point could benefit from educational programs.<sup>12</sup> However, instead of admitting that such children were educable, professionals developed the new category of "trainable" for these children.<sup>13</sup> As a result, a three category classification system for handicapped children developed: the educable, the trainable, and the sub-trainable.<sup>14</sup> These labels, although misleading, provided a justification for depriving many handicapped children of an adequate education. Many states built these classifications into their legislative schemes for education thus statutorily mandating the exclusion of many handicapped children from public educational programming.<sup>15</sup>

However, the late 1950s and early 1960s saw a revolution in the area of special education. Due in large part to the organizing of parents of handicapped children and the public awareness they generated,<sup>16</sup> increased attention and resources were devoted to the educational needs of the handicapped child.<sup>17</sup> This attention led to the discovery of new and more effective teaching aids and techniques for the handicapped.<sup>18</sup> A major breakthrough was the rise and general acceptance of the "developmental model" of mental handicapping conditions. This model views mentally handicapped children as developing individuals with the capacity to grow

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10. Burgdorf & Burgdorf, *supra* note 2, at 871. See also J. WALLIN, EDUCATION OF MENTALLY HANDICAPPED CHILDREN (1955).

11. Burgdorf & Burgdorf, *supra* note 2, at 873.

12. THE LEGAL RIGHTS OF HANDICAPPED PERSONS, *supra* note 2, at 56-57.

13. Burgdorf & Burgdorf, *supra* note 2, at 873, 874.

14. An I.Q. score of fifty was somewhat arbitrarily established as a line of demarcation. Those scoring above fifty were deemed educable and suitable for public school programs. Those not attaining this score were labeled trainable or sub-trainable and were excluded from public educational programs. J. WALLIN, *supra* note 10, at 65. Other labels, based upon I.Q. test scores, were also used. E.g., Idiot: a score of less than thirty (now commonly referred to as profoundly handicapped); Imbecile: a score between thirty and fifty (now referred to as severely handicapped); Moron: a score between fifty and seventy (now labeled mildly handicapped); Intellectually Dull: a score between seventy and eighty-five; Dull-Normal: a score between eighty-five and ninety. A. YATES, BEHAVIOR THERAPY 327 (1970).

15. See, e.g., OHIO REV. CODE ANN. § 3321.05 (Anderson 1975) (repealed 1976); OR. REV. STAT. § 336.090 (1947) (repealed 1965); PA. STAT. ANN. tit. 24, § 13-1375 (Purdon 1962) (amended 1965). A survey of state statutes describing classes of handicapped children excluded from public education, and other statutory limits on state mandates for the education of handicapped children is contained in several places in the legislative history of the EAHCA. See, e.g., SENATE REPORT, *supra* note 5, at 1444-45.

16. E.g., the National Association for Retarded Children was formed in September of 1950. See generally E. LEVINE & E. WEXLER, PL 94-142, AN ACT OF CONGRESS 14-16 (1981) (describing the rise of the advocacy movement for the handicapped).

17. The number of school districts offering some special educational services increased from 1500 in 1948 to 5600 in 1963. Burgdorf & Burgdorf, *supra* note 2, at 874. However, there was still an alarming shortage of services. For example, in 1962, 20,000 teachers were educating retarded children in special programs, but the need was for 75,000. In 1969, the number of teachers had increased to 34,000, but the need was estimated at 93,000. ROOS, *Trends and Issues in Special Education for the Mentally Retarded*, 5 EDUC. & TRAINING OF THE MENTALLY RETARDED, 51 (1970).

18. Such advances included the use of teacher aides to increase the effectiveness of educators; increased involvement of parents in the educational program; application of the autotelic responsive environment in the classroom; and technological advances leading to specialized equipment such as the "talking typewriter" and audiovisual aids. ROOS, *supra* note 17, at 52-54.

and learn. Under this model, even the most severely handicapped are presumed to have potential for development.<sup>19</sup>

The increased acceptance of the developmental model provided a basis for the rapid growth of educational programs and services for the handicapped. Many new teaching strategies were developed. One such strategy was the use of operant conditioning procedures. The theory behind these procedures is that a mental deficit can be identified and overcome by systematic techniques.<sup>20</sup> Operant procedures were shown to be successful with even the most severely handicapped children.<sup>21</sup> The developmental model, with its emerging reality that all handicapped children could benefit from educational programming, was in direct contrast to the previously prevailing attitude that many handicapped children were uneducable. In professional circles, this attitude was based in large part on the misapplication of the "medical model" of mental handicaps.<sup>22</sup> The "medical model" views handicapping conditions as sickness or disease best subject to medical treatment in medical facilities rather than as a deficit subject to educational efforts.<sup>23</sup> The medical model relieves the school of any responsibility for a handicapped child as it encourages the child to remain submissive and receive treatment as opposed to becoming active in an educational program. This, in turn, promotes passivity and hopelessness in the child.<sup>24</sup>

Success with even the most severely handicapped fostered the belief that the scope of special educational programs should be expanded to all levels of handicapping conditions. It was promptly discovered that the evaluative techniques which established educability cut-off marks were inaccurate. It was shown that traditional intelligence testing, which used an I.Q. mark of fifty to separate those who were educable from those categorized as trainable, was artificial and arbitrary. Some children classified as trainable were shown to have greater potential than some classified as educable.<sup>25</sup> As a result, new evaluative techniques were developed which measured a child's potential on the basis of many other factors than intelligence. In addition, these new techniques implemented a number of subscores as opposed to relying merely on one I.Q. score.<sup>26</sup> The evaluations were used less to

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19. For an extensive discussion of the developmental model, see generally F. MENOLASCINO, *OVERVIEW OF PROGRESSIVE IDEOLOGY IN MENTAL RETARDATION* (1976); P. ROOS, G. PATTERSON & B. MCCANN, *EXPANDING THE DEVELOPMENTAL MODEL* (1970); Switzky, Rotatori, Miller & Freagon, *The Developmental Model and Its Implications for Assessment and Instruction for the Severely/Profoundly Handicapped*, 17 *MENTAL RETARDATION* 167, 168 (1979).

20. A. YATES, *supra* note 14, at 324.

21. *Id.* at 332-34 (citing examples of the most profoundly handicapped children learning such skills as eating, toileting, and self-care); Roos, *supra* note 17, at 56; see also Stainback & Stainback, *A Review of Research on the Educability of Profoundly Retarded Persons*, 18 *EDUC. & TRAINING OF THE MENTALLY RETARDED* 90 (1983) (reviewing research evidence indicating the educability of profoundly retarded individuals).

22. A. YATES, *supra* note 14, at 324.

23. Roos, *supra* note 17, at 52.

24. *Id.* (also citing other destructive models for the handicapped including the model of the retarded as a "menace" to society. The "menace model" operates to foreclose the retarded from services and integration into the community. Also mentioned is the "subhuman model" for the retarded which fosters the attitude that the retarded do not share the same feelings and needs as the rest of society). See also Reger, *The Medical Model in Special Education*, 9 *PSYCHOLOGY IN THE SCHOOLS* 8 (1972) (explaining and criticizing the use of the medical model).

25. J. WALLIN, *supra* note 10, at 65.

26. New testing techniques included the Vineland Social Maturity Scale which measures the capacity to look after one's self in basic social activities; the Illinois Test of Psycholinguistic Abilities; and the Adaptive Behavior Checklist.

distinguish between those who could be educated and those who could not, and more for determining the type of educational programming appropriate for each particular child.<sup>27</sup> The attitude became prevalent that if a handicapped child failed a particular educational task, the failure was not indicative of the child's inability or lack of potential; instead it was taken as an indication that the program was defective or the teacher had failed.<sup>28</sup>

In 1961, the Washington State Board of Education prophesied the direction of special education philosophy by promulgating the following definition of educability: "A child shall be deemed educable if he possesses the potential to respond to and benefit from educational experiences in terms of such factors as social competence, emotional stability, self-care, a degree of vocational competency or intellectual growth."<sup>29</sup> This broad definition was interpreted as including all children and was one of the first official recognitions of the "zero reject" model of special education.<sup>30</sup> This model recognizes that all handicapped children, regardless of the gravity of their handicap, are educable. The responsibility for failure of a child to learn is placed on the system or the teacher rather than the one taught.<sup>31</sup>

The zero reject model became the dominant theme in special education, not only in this country but internationally. In 1968, the International League of Societies for the Mentally Handicapped adopted the position that "[t]he mentally retarded person has a right . . . to such education, training, habilitation and guidance as will enable him to develop his ability and potential to the fullest possible extent, no matter how severe his degree of disability."<sup>32</sup> The United Nations, in 1971, adopted a Resolution stating that a mentally retarded individual has the right to "such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential."<sup>33</sup>

Despite the growing recognition, both here and abroad, that all handicapped children are educable, large numbers of such children remained excluded from public

27. Appropriate evaluative testing procedures were eventually judicially enforced. See, e.g., *Diana v. State Bd. of Educ.*, C-70 37 RFP (N.D. Cal. Feb. 5, 1970), cited in Burgdorf & Burgdorf, *supra* note 2, at 882 & n.169.

28. See Lilly, *A Training Based Model for Special Education*, 37 *EXCEPTIONAL CHILDREN* 745 (1971); A. YATES, *supra* note 14, at 330-31.

29. L. LIPPMAN & I. GOLDBERG, *RIGHT TO EDUCATION* 6 (1973).

30. *Id.* at 6-7. See also Lilly, *Special Education: A Teapot in a Tempest*, 38 *EXCEPTIONAL CHILDREN* 43 (1970).

31. Lilly, *A Training Based Model for Special Education*, 37 *EXCEPTIONAL CHILDREN* 745 (1971). The zero reject model was also called the "fail-save" model. "The 'fail' represents the system's failure to meet all childrens' needs, not the child's. The 'save' represents the adaptation of the system to the child's individual needs and 'saves' him." Adamson & Van Eiten, *Zero Reject Model Revisited: A Workable Alternative*, 38 *EXCEPTIONAL CHILDREN* 735, 736 (1972).

32. Declaration of General and Special Rights of the Mentally Retarded, cited in L. LIPPMAN & I. GOLDBERG, *supra* note 29, at 7.

33. Declaration on the Rights of Mentally Retarded Persons, cited in L. LIPPMAN & I. GOLDBERG, *supra* note 29, at 104. Also, in 1971 the Council for Exceptional Children, an organization of special education professionals, adopted the following official policy statement:

Education is the right of all children. The principle of education for all is based on the philosophical premise of democracy that every person is valuable in his own right and should be afforded equal opportunities to develop his full potential. Thus, no democratic society should deny educational opportunities to any child, regardless of his potentialities for making a contribution to society.

Basic Commitments and Responsibilities to Exceptional Children, adopted, Council for Exceptional Children Delegate Convention, cited in 37 *EXCEPTIONAL CHILDREN* 181 (1971).

educational services.<sup>34</sup> The classification systems, in force legislatively and ingrained professionally, were slow to give way. In Pennsylvania, for example, the State's 1965 Mental Retardation Plan estimated that there were 70,000 to 80,000 retarded children between the ages of five and twenty-one in the state who were denied access to any public educational services.<sup>35</sup> In 1972, it was estimated that in Washington, D.C. alone, there were 22,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled children with as many as 18,000 of these children not being provided with any special education programs.<sup>36</sup> These numbers were reflected nationwide. As of 1972, one commentator estimated that of the approximately seven million handicapped children of school age in the country, one million were receiving no formal education at all and that over one half of those remaining were not receiving any form of special educational services.<sup>37</sup> As a result, parents and advocacy groups turned to the courts to secure education for all handicapped children.

### B. *Educability and the Courts*

The judicial system also played a role in fostering the notion that certain handicapped children were uneducable. Despite compulsory school attendance laws,<sup>38</sup> courts excluded many handicapped children from the educational system based on the rubric of "general welfare," "rights of other children," and "discipline and progress of the school."<sup>39</sup> Courts often viewed the presence of handicapped children in the classroom as being disruptive and having an adverse effect on both teachers and other students. The Supreme Court of Wisconsin permitted a school board to exclude a physically handicapped student from a public school even though the child kept pace with his peers.<sup>40</sup> The court ruled that the cerebral palsied child's drooling contributed to an interference with the discipline and progress of the school.<sup>41</sup>

It was not until 1954 that advocates for the handicapped received a legal basis for future attacks on exclusionary educational policies. In that year, the Supreme Court decided *Brown v. Board of Education*.<sup>42</sup> Although the Court stopped short of holding education a fundamental right guaranteed by the Constitution, it stated that when the state provides education to *some* students, the equal protection clause required equal access to education of *all* students.<sup>43</sup>

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34. See 20 U.S.C. § 1400(b) (1982); THE LEGAL RIGHTS OF HANDICAPPED PERSONS, *supra* note 2, at 57.

35. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 296 (E.D. Pa. 1972) (citing the Commonwealth's Mental Retardation Plan at 4, 92, 93, 142), *modifying* 334 F. Supp. 1257 (E.D. Pa. 1971).

36. Mills v. Board of Educ., 348 F. Supp. 866, 868 (D.D.C. 1972).

37. Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1038 (1972).

38. All states except Mississippi have compulsory school attendance laws.

39. For a summary of such court decisions, see Zedler, *Public Opinion and Public Education for the Exceptional Child—Court Decisions 1873-1950*, 19 JOURNAL OF EXCEPTIONAL CHILDREN 187 (1953). See also J. WALLIN, *supra* note 10, at 66 (citing additional cases).

40. State *ex rel.* Beattie v. Board of Educ., 169 Wis. 231, 172 N.W. 153 (1919).

41. *Id.* at 235, 172 N.W. at 155; See also Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893) (mentally retarded child excluded from public education because the school decided he was troublesome and could not benefit from the instruction).

42. 347 U.S. 483 (1954).

43. *Id.* at 493.

One of the first judicial assaults upon the educable-uneducable classification system was in Utah. There, the court, in emphasizing the importance of an education for all individuals, ordered two handicapped children, classified as "trainable," into the public school system.<sup>44</sup>

The seminal case in the quest for adoption of the zero reject education concept was *Pennsylvania Association for Retarded Children v. Pennsylvania (PARC)*.<sup>45</sup> This case was a class action brought on behalf of all mentally retarded children in Pennsylvania who were excluded from a public education.<sup>46</sup> The suit directly attacked a statutory scheme which allowed schools to exclude children deemed uneducable or untrainable.<sup>47</sup> The plaintiffs argued that excluding handicapped children from a public education, while providing such education to children who were not handicapped, violated the equal protection clause.<sup>48</sup> In addition, the plaintiffs asserted that the statutes violated due process in that they allowed exclusion or a change in placement without notice and a hearing.<sup>49</sup>

Knowing that this case would be watched by the mass media, the general public, and the legislature, counsel for plaintiffs attempted to establish as clearly and forcibly as possible that every handicapped child, without exception, can benefit from education. Counsel assembled seven of the top professionals in the field to testify on the educability of handicapped children.<sup>50</sup> On August 12, 1971, the witnesses were presented in a preliminary hearing before a three judge federal court panel. After only four of the witnesses had testified, counsel for the defendants agreed that no further testimony would be needed to establish plaintiffs' assertions.<sup>51</sup>

Witnesses for the plaintiffs established the importance of education for retarded children and, more importantly, emphasized in no uncertain terms that all children can be educated.<sup>52</sup> The expert testimony established such facts as that among every thirty retarded children, with an appropriate program of education, twenty-nine can achieve self-sufficiency: twenty-five of them in the ordinary way in the marketplace and four

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44. *Wolf v. Legislature of Utah*, Civ. No. 182646 (3d Dist. Utah Jan. 8, 1969), cited in Burgdorf & Burdorf, *supra* note 2, at 876 & n.123.

45. 334 F. Supp. 1257 (E.D. Pa. 1971), modified, 343 F. Supp. 279 (E.D. Pa. 1972).

46. 343 F. Supp. 279, 281-82 (E.D. Pa. 1972).

47. The four statutory provisions that were attacked were: (1) PA. STAT. ANN. tit. 24, § 13-1304 (Purdon 1962) (allowing the State Board of Education to exclude any child who had not attained a mental age of five); (2) PA. STAT. ANN. tit. 24, § 13-1326 (Purdon 1962) (interpreted to allow the postponement of admitting retarded students until the chronological age of eight); (3) PA. STAT. ANN. tit. 24, § 13-1330 (Purdon 1962) (excusing from compulsory school attendance any child who had been determined by a school psychologist to be unable to profit from public school attendance); (4) PA. STAT. ANN. tit. 24, § 13-1375 (Purdon 1962) (excusing the State Board of Education from providing services to any child deemed uneducable by a school psychologist).

48. 343 F. Supp. 279, 297 (E.D. Pa. 1972).

49. *Id.* at 283.

50. These witnesses were: Ignacy Goldberg, Teachers College, Columbia University; James Gallagher, former director of the Bureau of Education for the Handicapped; Donald Stedman, University of North Carolina; Burton Blatt, Syracuse University; Allen Crocker, Children's Hospital Medical Center, Boston; Jean Hebel, University of Maryland; Gunnar Dybwad, Brandeis University. Gilhool, *Education an Inalienable Right*, 39 EXCEPTIONAL CHILDREN 597, 603-04 (1973).

51. L. LIPPMAN & I. GOLDBERG, *supra* note 29, at 29; *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 285 (E.D. Pa. 1972).

52. This assertion of educability was not really contested by state officials. It was discovered that ten days before the trial, officials of both the State Bureau of Education and Department of Public Welfare admitted to the Attorney General that the educability of all children could not be disputed. See Gilhool, *supra* note 50, at 604.



in a sheltered environment. The remaining one of every thirty is capable of achieving a significant degree of self-care.<sup>53</sup> The experts also showed how the single I.Q. test score was not an accurate measurement of a child's potential and that the labels used as a result of this one score had a stigmatizing effect on the child.<sup>54</sup> It was also established that handicapped children should receive educational services at the earliest possible age.<sup>55</sup>

The *PARC* case resulted in a consent agreement explicitly noting that all mentally retarded persons are educable.<sup>56</sup> In addition, the Commonwealth affirmed its obligation to provide every mentally retarded child with an educational program appropriate to the child's needs.<sup>57</sup>

*PARC* was succeeded by a similar action in the District of Columbia, *Mills v. Board of Education*.<sup>58</sup> This action was brought on behalf of all children with various handicapping conditions who were excluded from a public education as opposed to the class in *PARC* who represented only the mentally retarded. As in *PARC*, counsel for plaintiffs presented substantial evidence that all handicapped children can benefit from an educational program.<sup>59</sup> Before the final court opinion was issued, the District of Columbia Board of Education formally adopted a resolution stating in part: "[E]veryone is entitled to a free publicly supported education suited to his needs, regardless of the degree of his mental, physical or emotional disability or impairment, and regardless of where he lives."<sup>60</sup> Relying on the equal protection clause, the court ordered the District of Columbia to provide to each child of school age a free and suitable publicly supported education regardless of the degree of the child's disability.<sup>61</sup> The court also provided for a number of procedural safeguards relying on the due process clause.<sup>62</sup> The court further held that exclusion on the basis of insufficient resources would not be acceptable, stating:

If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in

53. 343 F. Supp. 279, at 296 (E.D. Pa. 1972); see also Gilhool, *The Central Role of Fact in the Law*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 179-80 (1976) (elaborating on evidence introduced in the case).

54. 343 F. Supp. at 295.

55. See L. LIPPMAN & I. GOLDBERG, *supra* note 29, at 29.

56. 343 F. Supp. 279, 287-88 (E.D. Pa. 1972).

57. *Id.* at 296. The consent agreement received final approval by court order on May 5, 1972. Thus, the court did not have to reach the constitutional issues presented. However, the court did state that by stigmatizing a child through exclusion, due process could be violated without notice and a hearing. *Id.* at 295. The court also commented that it was doubtful that there is even a rational basis for excluding mentally retarded children from a public education. *Id.* at 297.

58. 348 F. Supp. 866 (D.D.C. 1972).

59. E.g., Affidavit of Erwin Friedman, Ph.D., in 2 *LEGAL RIGHTS OF THE MENTALLY HANDICAPPED* 951 (1973) (stating: I cannot overemphasize the importance of a structured educational program for the severely retarded. Such a program in my experience can change the nature of the individual's life in the most fundamental way. We have taken young adults, severe retardates who have spent all their lives in institutions and taught them to become self-sufficient to the degree that they can hold down simple, paying jobs in a sheltered setting, and get to and from work on their own. I have always been disturbed by any concept of "education" that would allow these people to be shut out from the compulsory education laws . . . ).

*Id.* at 951.

60. L. LIPPMAN & I. GOLDBERG, *supra* note 29, at 50.

61. 348 F. Supp. 866, 878 (D.D.C. 1972).

62. *Id.* at 880-84.

such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.<sup>63</sup>

Thus, the court emphatically expanded the zero reject model of special education to all handicapped children regardless of the type of handicap.

*PARC* and *Mills* were catalysts for numerous similar lawsuits brought around the country.<sup>64</sup> In *Lebanks v. Spears*,<sup>65</sup> a federal court in Louisiana adopted the zero reject policy in approving a consent decree which mandated suitable public education for all retarded children up to the point of self-sufficiency or employability. An Alabama federal court in *Wyatt v. Stickney*<sup>66</sup> extended the right to education to the institutionalized regardless of the degree of handicap. The North Dakota Supreme Court also adopted the zero reject model using both the state and federal constitutions as a basis.<sup>67</sup>

Perhaps the most explicit judicial attack on educational categorizations excluding some handicapped children from educational services was *Maryland Association for Retarded Children v. State*.<sup>68</sup> In this case, the court held that one cannot distinguish between the classifications of "education" and "training" stating: "A child may be trained to read or write, or may be educated to read and write. A child may be educated to tie his own shoes or trained to tie his shoes. Every type of training is at least a sub-category of education."<sup>69</sup>

The dramatic increase in zero reject education cases spurred state legislation in the area. By 1973, states such as Rhode Island, North Dakota, Wisconsin, Tennessee, and Indiana had statutorily adopted the zero reject model.<sup>70</sup> Indeed, in 1971, only seven states had legislation requiring education for certain types of handicapped children.<sup>71</sup> However, by 1975, forty-one states had enacted legislation requiring provision of educational services to handicapped children.<sup>72</sup>

### C. The Zero Reject Model and the EAHCA

Both the language of the EAHCA and its legislative history clearly show that Congress was in agreement with the widespread professional and judicial acceptance of the zero reject special education model. The Act's opening provision states in part: "It is the purpose of this chapter to assure that *all* handicapped children have

63. *Id.* at 876.

64. Many of these cases are cited in Burgdorf & Burgdorf, *supra* note 2, at 878 n.136.

65. 60 F.R.D. 135 (E.D. La. 1973).

66. 325 F. Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards by defendants*, 334 F. Supp. 1341, *supplement*, 344 F. Supp. 373 and 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, rev'd in part, sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

67. *In re G.H.*, 218 N.W.2d 441 (N.D. 1974) (The court relied on the equal protection clauses of the state and federal constitutions and the due process and privileges and immunities clauses of the state constitution. *Id.* at 447.).

68. Eq. No. 100/182/77676 (Cir. Ct. Baltimore County, Md. May 3, 1974), *cited in* Burgdorf & Burgdorf, *supra* note 2, at 878 & n.136.

69. *Id.* at 4-5. See also J. WALLIN, *supra* note 10, at 65 ("In point of fact, there is no sharp distinction between trainability and educability; there are varying degrees of trainability just as there are varying degrees of educability, and nowhere is there a sharp schism between different learning processes.").

70. See Wald, *The Right to Education*, 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 831 (1973).

71. See H.R. REP. NO. 332, 94th Cong., 1st Sess. 10 (1975).

72. See SENATE REPORT, *supra* note 5, at 1432.

available to them . . . a free appropriate public education . . . .”<sup>73</sup> The Act requires that a state, in order to receive federal financial assistance, must demonstrate that it “has in effect a policy that assures all handicapped children the right to a free appropriate public education.”<sup>74</sup> The Act goes on to require a state to identify, locate, and evaluate all handicapped children residing within its boundaries “regardless of the severity of their handicap.”<sup>75</sup>

The Act’s very broad definition of “handicapped children”<sup>76</sup> also indicates Congress’ acceptance of the zero reject approach. The definition encompasses children suffering from the most serious of handicapping conditions including schizophrenia<sup>77</sup> and multihandicapping disabilities.<sup>78</sup> In addition, Congress set up a prioritizing scheme for providing educational services under the Act.<sup>79</sup> Children having first priority are those excluded from public educational services.<sup>80</sup> Generally, these are the most seriously handicapped, previously excluded by their categorization as uneducable. Next in line for services are “handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education . . . .”<sup>81</sup>

The legislative history of the EAHCA reinforces the assertion that Congress adopted the zero reject model. Congress was well aware of the major right-to-education cases which judicially enforced the zero reject policy.<sup>82</sup> Indeed, these cases played a large role in persuading Congress to act in the area.<sup>83</sup> In the Senate Report, Congress specifically took note of the *PARC* and *Mills* cases stating that the “right to education is no longer in question.”<sup>84</sup>

The Act’s legislative history also emphasizes statistics showing that there were still many handicapped children who were excluded from the public education system.<sup>85</sup> In noting these statistics, Senator Williams stated: “While much progress

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73. 20 U.S.C. § 1400(c) (1982) (emphasis added).

74. 20 U.S.C. § 1412(1) (1982).

75. 20 U.S.C. § 1414(a)(1)(A) (1982).

76. See 20 U.S.C. § 1401(a)(1) (Supp. III 1985) and 34 C.F.R. § 300.5 (1987).

77. 34 C.F.R. § 300.5(b)(8)(ii) (1987).

78. 34 C.F.R. § 300.5(b)(5) (1987).

79. 20 U.S.C. § 1412(3) (1982).

80. *Id.*

81. *Id.*

82. See, e.g., SENATE REPORT, *supra* note 5, at 1430.

83. See *id.* at 1429 (stating: “Increased awareness of the educational needs of handicapped children and landmark court decisions establishing the right to education for handicapped children pointed to the necessity of an expanded Federal fiscal role.”). See also 121 CONG. REC. 19504 (1975) (remarks of Sen. Schweiker) (“This measure is the result of many court decisions, including the historic right to education consent agreement between the Pennsylvania Association for Retarded Persons and the Commonwealth of Pennsylvania . . .”).

84. See SENATE REPORT, *supra* note 5, at 1430. The Senate Report went on to note that the 1974 Education Amendments, Pub. L. No. 93-380, §§ 611-621, 88 Stat. 579-85 (1974) (codified at 20 U.S.C. §§ 1401-1461 (1982 & Supp. III 1985)), which were the basis for the EAHCA, “incorporated the major principles of the right to education cases.” SENATE REPORT, *supra* note 5, at 1430. See also 120 CONG. REC. 4212, 4313 (daily ed. May 21, 1974) (statement of Rep. Vanik) (“There have been 36 court cases in 24 states on the right to education for all handicapped children. . . . In those cases which have been decided, judgments have been given—as they should be—in favor of the handicapped children and their parents.”). See also 121 CONG. REC. 37023, 37025 (1975) (remarks of Rep. Brademas) (“there have been landmark judicial decisions in which the courts have recognized the rights of each handicapped child to have a free appropriate public education. Thus far there have been some 46 court cases regarding the right to an education for each handicapped child.”).

85. See SENATE REPORT, *supra* note 5, at 1432 (noting that:

has been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact, receiving an education."<sup>86</sup> This concern with children excluded from public educational services is exemplified throughout the Act's legislative history.<sup>87</sup> Such concern shows that Congress was intent on providing educational services to these excluded children, regardless of the severity of their handicaps.<sup>88</sup>

The vast majority of courts interpreting the EAHCA have also recognized that the Act embraces the zero reject education concept. In *Board of Education v. Rowley*,<sup>89</sup> the United States Supreme Court had its first opportunity to interpret the Act's requirement of a "free appropriate public education." In so doing, the Court repeatedly emphasized that Congress intended to provide access to educational services for all handicapped children.<sup>90</sup> Other federal courts have been just as explicit in holding that the Act embodies the zero reject policy. In *Kruelle v. New Castle County School District*,<sup>91</sup> the Third Circuit mandated educational services for a profoundly retarded child who suffered from cerebral palsy and emotional problems. In addition, the child could not speak and lacked self-help skills. In requiring services for this child—who would certainly have been deemed uneducable under the previous classification systems<sup>92</sup>—the court stated: "The Education Act unqualifiedly provides for a free appropriate education for all handicapped children, 'regardless of the severity of their handicap.'" <sup>93</sup> Likewise, in *Gladys J. v. Pearland Independent School District*,<sup>94</sup> a Texas district court required services for a schizophrenic child stating that "[t]he language and legislative history of that Act simply do not admit of the possibility that some children may be beyond the reach of our educational

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of the more than 8 million children (between birth and twenty-one years of age) with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education.).

86. 121 CONG. REC. 19478, 19486 (1975).

87. *E.g.*, 121 CONG. REC. 19487, 19491 (1975) (Sen. Williams introducing tables showing a state-by-state breakdown of excluded and inappropriately served handicapped children); 121 CONG. REC. 19502 (1975) (remarks of Sen. Cranston) ("the right to a free appropriate education . . . has not been extended universally in our country. Some 7.8 million children . . . are largely excluded from the educational opportunities that we give to our other children. They are children with physically and emotionally handicapping conditions . . ."); 121 CONG. REC. 19504 (1975) (remarks of Sen. Schweiker) ("a total of 1.75 million handicapped children are receiving no educational services at all."); 121 CONG. REC. 19505 (1975) (remarks of Sen. Humphrey) ("There are approximately 8 million handicapped children . . . in this country. Over a million of these children receive no educational opportunities whatsoever.").

88. *See, e.g.*, 121 CONG. REC. 37418 (1975) (remarks of Sen. Cranston) ("Some 8 million children who fall within this age group are largely excluded from the educational opportunities that we give most other children because of their handicapping conditions. It is these children to which this legislation is directed, and it is these children who will benefit so greatly by Senate approval of the conference report."); 121 CONG. REC. 19505 (1975) (remarks of Sen. Humphrey) ("I believe a profound injustice has been suffered by these handicapped children of school age who are excluded from public schools.").

89. 458 U.S. 176 (1982).

90. In emphasizing congressional intent to provide access to educational services for all handicapped children, the Court made such remarks as: "The face of the statute evidences a congressional intent to bring previously excluded handicapped children into the public education systems of the States . . ." *Id.* at 189; "By passing the Act, Congress sought primarily to make public education available to handicapped children." *Id.* at 192; "[A]ccess to an 'education' for handicapped children is precisely what Congress sought to provide in the Act." *Id.* at 203.

91. 642 F.2d 687 (3d Cir. 1981).

92. *See supra* notes 10-15 and accompanying text.

93. 642 F.2d 687, 693 (3d Cir. 1981) (quoting 20 U.S.C. § 1412(2)(c) (1976)).

94. 520 F. Supp. 869 (S.D. Tex. 1981).

expertise.”<sup>95</sup> Similarly, in *Matthews v. Campbell*,<sup>96</sup> a Virginia district court reasoned that the Act does not contemplate the possibility that there are children who cannot benefit from educational services.<sup>97</sup>

The Act’s language, its legislative history, and judicial interpretations evidence that the zero reject special educational model, wherein no child is deemed uneducable, is at the core of its philosophy.

### III. THE EAHCA

Despite the widespread professional acceptance of the zero reject model and the onslaught of right-to-education cases enforcing it, by 1975 there were still 1.75 million handicapped children deprived of any educational services, with another 2.5 million children receiving educational services inappropriate to their needs.<sup>98</sup> Congress noted that the lack of financial resources was preventing states from complying with the mandates of the right-to-education cases.<sup>99</sup> To assist the states, Congress expanded the federal fiscal role through enactment of Public Law 94-142, The Education for All Handicapped Children Act of 1975.<sup>100</sup> The Act is primarily a funding statute with comprehensive requirements that a state must comply with in order to receive financial assistance.<sup>101</sup>

The heart of the Act is the requirement that each participating state<sup>102</sup> provide a “free and appropriate public education” (FAPE) to all handicapped children<sup>103</sup> within its jurisdiction.<sup>104</sup> However, the Act does not set out the specific services necessary to constitute a FAPE. Instead, the Act requires that the handicapped child’s teacher, parents, other professionals, and, when appropriate, the child himself, convene to develop an “individualized education program” (IEP) for the child.<sup>105</sup> The IEP includes a written statement of the present level of the child’s educational performance, his annual and short-term instructional objectives, evaluation procedures to be used to determine his progress, and, most importantly, the specific educational services to be offered the child and the setting in which they are to be provided.<sup>106</sup> Thus, the responsibility for defining the scope of educational services to be offered a child is, at least in the first instance, with school district officials and the

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95. *Id.* at 879.

96. 1979-80 EDUC. OF THE HANDICAPPED L. REP. 551:264 (E.D. Va. July 1979) [hereinafter EHLR].

97. *Id.* at 551:266.

98. See SENATE REPORT, *supra* note 5, at 1432.

99. *Id.* at 1431.

100. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1232, 1400-1401, 1405-1406, 1411-1420, 1453 (1982 & Supp. III 1985)).

101. See *supra* note 5 and accompanying text. For a description of federal laws relating to the education of handicapped children in effect previous to the EAHCA, see Note, *The Education for All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110, 118-20 (1976).

102. Currently, all 50 states participate under the Act.

103. The Act contains a broad definition of handicapped children. See 20 U.S.C. § 1401(a)(1) (Supp. III 1985) and 34 C.F.R. § 300.5 (1987) (containing working definitions of the statutory classifications).

104. 20 U.S.C. § 1412(2) (1982).

105. 20 U.S.C. § 1401(a)(19) (1982 & Supp. III 1985).

106. *Id.* See also 34 C.F.R. §§ 300.340-.349 (1987) (elaborating on the statutory definition of an IEP). For a further discussion of the IEP procedure, see Note, *Education of Handicapped Children: The IEP Process and the Search for an Appropriate Education*, 56 ST. JOHN’S L. REV. 81 (1981).

child's parents. However, the proposed IEP is subject to review by local and state hearing officers.<sup>107</sup> The hearing officer's decision can then be appealed to either state or federal court.<sup>108</sup>

Congress attempted to assist parents and educators in defining at least the broad contours of appropriate educational services. A "free appropriate public education" is cryptically defined as being composed of two components: "special education" and "related services" which are provided in conformity with the individualized education program.<sup>109</sup> Special education is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."<sup>110</sup> Related services include "such developmental, corrective, and other supportive services . . . required to assist a handicapped child to benefit from special education. . . ."<sup>111</sup>

Unfortunately, these statutory definitions are not of much assistance in determining what specific services a school district must provide under the label "education." A close reading of the statutory provisions indicates that to be appropriate, an educational program must, at a minimum, be designed to meet the unique individual needs of a handicapped child. Indeed, the United States Supreme Court recently affirmed the emphasis on individual needs in structuring the content of an educational program. In *Board of Education v. Rowley*,<sup>112</sup> the Court defined free appropriate public education as "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to 'benefit' from the instruction."<sup>113</sup> However, in setting a standard of "some educational benefit" which each child is entitled to under

107. 20 U.S.C. § 1415(b)(2) (1982). The Act sets forth a number of procedural safeguards for handicapped children and their parents during the IEP process. These protections include the opportunity to examine relevant records; the right to obtain an independent educational evaluation; the right to prior written notice of any proposed changes in evaluation, services, or placement; and the right to file complaints that trigger the administrative due process hearing procedures. 20 U.S.C. § 1415(b)(1) and (2) (1982). If the due process hearing is conducted by a local or intermediate educational unit, it shall be subject to an independent review by the state education agency. 20 U.S.C. § 1415(c) (1982). See also 34 C.F.R. §§ 300.500-.514 (1987) (elaborating on the statutory procedural safeguards). See also 20 U.S.C. § 1415(d) (1982) (enumerating the rights accorded to the parties during the administrative hearings).

108. 20 U.S.C. § 1415(e)(1)-(4) (1982). The Supreme Court has addressed the standard of review for courts under the Act. See *Board of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

109. 20 U.S.C. § 1401(a)(18) (1982 & Supp. III 1985) (defining free appropriate public education as "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program under section 614(a)(5) [20 U.S.C. § 1414(a)(5)]."

110. 20 U.S.C. § 1401(a)(16) (1982 & Supp. III 1985).

111. 20 U.S.C. § 1401(a)(17) (1982 & Supp. III 1985) (defining related services as follows:

[T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

See also 34 C.F.R. § 300.13 (1987) (elaborating on the statutory definition of related services).

112. 458 U.S. 176 (1982).

113. *Id.* at 188-89.

the Act, the Court was addressing the extent and degree of services which must be provided rather than the range or type of services a school district must provide.<sup>114</sup>

A handicapped child can present a wide variety of unique needs depending on the severity of the handicapping condition. Consequently, a broad array of services are often required to meet such needs. The vagueness of the statutory language has fostered debate on the range of unique needs which must be served by school districts as "educational needs" under the Act. Some argue educational needs are broad in scope requiring school districts to provide an extensive array of both instructional and noninstructional services while others have taken a much narrower view of the services a school district must provide under the rubric of "appropriate education."<sup>115</sup> That is, while admittedly a handicapped child may present a broad array of needs, only a limited number of them qualify as "educational" in nature.

These conflicting views have led to disputes between parents and school districts over what services must be included in a child's IEP. These disputes often end up in state or federal court where a judge is required to determine the specific services necessary to constitute a "free appropriate public education."<sup>116</sup> Judicial resolutions of these conflicts have varied. The lack of uniformity is especially evident when expensive, nontraditional types of services, such as residential placements, have been at issue. Results of these cases often depend on how the particular court defines the concept of education as used in the Act. The broader the court interprets education, the more services it is likely to require as part of an appropriate public educational program. Thus, it would seem that the first step in reaching a uniform resolution to these disputes is to determine the proper scope of education.

#### IV. THE DEFINITION OF EDUCATION

##### A. Judicial Interpretations of Education

The functioning of a democratic society is dependent on an effective educational system. Education gives the citizenry the opportunity to acquire the skills necessary to conduct the process of self-government.<sup>117</sup> As the New Jersey Supreme Court has stated, education is necessary to prepare children to function politically, economically, and socially in a democratic society.<sup>118</sup> Thus, even outside the special education context, notions of public education have included more than mere training in academics.<sup>119</sup> Traditional curricula emphasizing instruction in the "three R's"

114. The *Rowley* decision has generated a substantial amount of commentary. See, e.g., Myers & Jensen, *The Meaning of "Appropriate" Educational Programming Under the Education for All Handicapped Children Act*, 1984 S. ILL. U.L.J. 401; Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MO. L. REV. 466 (1983); Note, *Board of Education v. Rowley: Landmark Roadblock or Another Signpost on the Road to State Courts*, 16 CONN. L. REV. 149 (1983).

115. Compare *Kruelle v. New Castle County School Dist.*, 642 F.2d 687 (3d. Cir. 1981) with 1983-84 EHLR Decisions 505:230 (SEA Ill. Jan. 12, 1984) (name not provided), [hereinafter EHLR DEC.].

116. For a listing and description of many of these cases, see T. MARVELL, A. GALFO & J. ROCKWELL, *STUDENT LITIGATION, A COMPILATION AND ANALYSIS OF CIVIL CASES INVOLVING STUDENTS 1977-1981* (1982).

117. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

118. *Levine v. Institutions & Agencies Dep't*, 84 N.J. 234, 247, 418 A.2d 229, 236 (1980).

119. A review of judicial interpretations of education reflects this fact. E.g., *Young v. Linwood School Dist.*, 193

have been expanded to include such areas as home economics, physical education, driver training, sex education, job skill training, and other nonacademic subjects.

In a democracy, however, the purpose of education is not limited to merely equipping children to participate in the political, economic, and social processes. This limited view of education was the justification used by at least one court for excluding certain handicapped children from public educational services. The New Jersey Supreme Court in *Levine v. Institution & Agencies Department of New Jersey*<sup>120</sup> relied on such an interpretation in holding that profoundly retarded children, categorized as sub-trainable under the state legislative scheme, can be excluded from public educational services under the state constitution. The court reasoned that because these children were not likely to achieve any degree of personal independence, nor social and economic usefulness, public educational services would be wasted on them.<sup>121</sup>

In effect, the *Levine* court equated the concept of education with political, economic, and social usefulness to society. However, such a restricted view of education is actually antithetical to a democratic view of an individual's worth in society. As the Council for Exceptional Children noted:

The principle of education for all is based on the philosophical premise of democracy that every person is valuable in his own right and should be afforded equal opportunities to develop his full potential. Thus, no democratic society should deny educational opportunities to any child, regardless of his potentialities for making a contribution to society.<sup>122</sup>

In a democracy, an individual's worth is not solely measured by his contribution to the societal machinery. Instead, each individual is respected as a human being and, as Judge Pashman asserted in a dissenting opinion in *Levine*, "it is by education that each of us . . . attains the full measure of the humanity we possess."<sup>123</sup> As Judge Pashman further stated:

I cannot accept a definition of education which does not provide to each child the training and assistance necessary to function as best they can in whatever will be their environment—even if that environment will be insulated from the world of politics and economic competition . . . . The differences in the capacity to benefit from education among mentally impaired children are assuredly differences in degree. But because of their shared humanity, they cannot be considered differences in kind.<sup>124</sup>

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Ark. 82, 85, 97 S.W.2d 627, 629 (1936) ("We think it just as important that children should be developed physically and morally as it is that they should be developed mentally."); *Dodge v. Jefferson County Bd. of Educ.*, 298 Ky. 1, 5, 181 S.W.2d 406, 408 (1944) ("education may, in the common acceptance of the word, be particularly directed to development of either mental, moral or physical powers, but in its broadest and best sense, embraces them all."); *German Gymnastics Ass'n v. City of Louisville*, 117 Ky. 958, 961, 80 S.W. 201, 201 (1904) ("The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to a perfected education."); see also 14 WORDS & PHRASES 123-27 (1952) (collecting definitions of education).

120. 84 N.J. 234, 418 A.2d 229 (1980).

121. *Id.* at 250, 418 A.2d at 237 (1980).

122. Position paper adopted by the Council for Exceptional Children in April 1971, reprinted in L. LIPPMAN & I. GOLDBERG, *supra* note 29, at 87 [hereinafter Position Paper].

123. 84 N.J. 234, 269, 418 A.2d 229, 247 (1980) (Pashman, J., dissenting).

124. *Id.* at 275, 418 A.2d at 250-51 (Pashman, J., dissenting) (footnote omitted).



Fortunately, the limited objective of education applied by the *Levine* court has not gained any degree of acceptance by courts or professional educators. The United States Supreme Court took a more expansive view in *Wisconsin v. Yoder*<sup>125</sup> and defined an appropriate education as that which prepares a child for life in the particular community setting in which the child will live.<sup>126</sup> Under this reasoning, it is possible to state that the primary purpose of education is to serve the individual child as opposed to serving society by enabling the child to contribute to the state politically, economically, and socially. This reasoning suggests that even if a handicapped child is not expected to progress beyond a sheltered setting, the child would still be entitled to an education geared to meet the individual's needs for life in such a setting. As noted earlier,<sup>127</sup> an Alabama federal court in *Wyatt v. Stickney*<sup>128</sup> held that even those individuals who were handicapped severely enough to require institutionalization were entitled to education suited to their needs.

Other courts have been just as explicit in broadly interpreting the concept of education. In *Halderman v. Pennhurst State School & Hospital*,<sup>129</sup> a Pennsylvania district court equated education with habilitation, the purpose of which is to maximize the development of retarded individuals without a qualification that the development reach a certain level.<sup>130</sup> Likewise, the court in *Fialkowski v. Shapp*<sup>131</sup> took an expansive view of education, noting that profoundly retarded children require formal educational services which are geared to their individual needs.<sup>132</sup> The court included in its definition of education the teaching of skills and knowledge which nonhandicapped children develop and learn informally.<sup>133</sup> Perhaps the clearest judicial statement of the wide scope of education was by a New York family court in *In re Tracy Ann Cox*,<sup>134</sup> holding that education included such services as teaching the handicapped child how to hold a spoon and feed herself, how to dress, go to the bathroom, psychological and psychiatric treatment, and speech therapy.<sup>135</sup>

### B. Professional Interpretations of Education

Professionals in both the fields of handicaps and education have likewise given a broad interpretation to the concept of education. The Council for Exceptional Children stated:

The fundamental purposes of Special Education are the same as those of regular education: the optimal development of the individual as a skillful, free, and purposeful person, able to

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125. 406 U.S. 205 (1972).

126. *Id.* at 222.

127. See *supra* note 66 and accompanying text.

128. 344 F. Supp. 387, 396 (M.D. Ala. 1972), *aff'd in part, remanded in part, rev'd in part, sub. nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

129. 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd in part and remanded*, 451 U.S. 1 (1981).

130. *Id.* at 1298.

131. 405 F. Supp. 946 (E.D. Pa. 1975).

132. *Id.* at 959.

133. *Id.*

134. No. H-4721-75 (N.Y. Fam. Ct. Queens County Apr. 18, 1976), *cited in* R. MARTIN, *EDUCATING HANDICAPPED CHILDREN; THE LEGAL MANDATE*, 13 (1979).

135. *Id.*

plan and manage his own life and to reach his highest potential as an individual and as a member of society. Indeed, Special Education developed as a set of highly specialized areas of education in order to provide exceptional children with the same opportunities as other children for a meaningful, purposeful, and fulfilling life.<sup>136</sup>

Such an interpretation of education stresses the expansion of services beyond the teaching of mere academics to include services geared toward meeting the individual needs of the child as a total human being. As the Council went on to state: "The focus of all education should be the unique learning needs of the individual child, and of the child as a total functioning organism."<sup>137</sup>

Another professional emphasized the broad array of services necessary to an appropriate education when he stated:

Education has to be defined in the broad sense as a process whereby a child learns to live in his environment through the acquisition of knowledge and skills. Thus, to teach a child to eat, use the toilet, walk on the streets, avoid dangers, and to get along in a social setting with others is a major educational achievement. Toilet training, for example, is a much greater educational "threshold" than the completion of a four year undergraduate program; and the fact that this sort of learning might be labeled "habit training" in no way makes it any less "education" than training an individual to manipulate abstract symbols, which is what reading and writing really is. . . .<sup>138</sup>

By focusing on the unique learning needs of each handicapped child, the type of educational services provided must be expanded beyond those needed to educate nonhandicapped children. Without specialized services geared to the particular needs, allowing the handicapped child mere access to the public school system is meaningless. In *Lau v. Nichols*,<sup>139</sup> the United States Supreme Court recognized that mere presence in a classroom does not constitute education if the child is unable to benefit from the curriculum.<sup>140</sup> The Court held that the California public school system denied non-English speaking Chinese students "a meaningful opportunity to participate in the educational program" by failure to provide English language instruction.<sup>141</sup> Similarly, handicapped children need additional educational services geared to their unique learning needs if they are to benefit from public education. This

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136. See Position Paper, *supra* note 122, at 89. The Council went on to emphasize that education must meet the individual needs of each child:

To Special Educators, the statements of educational goals that stress the primacy of intellectual development are inadequate. They have learned from their experiences with children who have learning problems that so-called "intelligent" behavior is interrelated with individual motivation, cultural values, physical competency, self-esteem, and other non-cognitive variables.

Perhaps the most important concept that has been developed in Special Education as a result of experiences with exceptional children, is that of the fundamental individualism of every child. The aspiration of Special Educators is to see every child as a unique composite of potentials, abilities, and learning needs for whom an educational program must be designed to meet his particular needs.

*Id.*

137. *Id.* at 90.

138. Affidavit of Erwin Friedman, Ph.D., reprinted in 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 951 (1973).

139. 414 U.S. 563 (1974).

140. *Id.* at 568. *Accord* Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

141. 414 U.S. 563, 568 (1974).

problem was addressed by a Pennsylvania court in *Frederick L. v. Thomas*.<sup>142</sup> In holding that learning disabled children were entitled to instruction specially geared to their handicaps, the court stated:

Many of the plaintiffs, it is said, cannot derive any educational benefit from the normal curriculum if that experience is not mediated by special instruction aimed at their learning handicaps. We are told that inappropriate educational placements predictably lead to severe frustration and to other emotional disturbances which impede the learning and erupt into antisocial behavior. On this basis it is argued that some or all of the class is constructively excluded from public educational services, because—for them—the instruction offered is virtually useless, if not positively harmful.<sup>143</sup>

Nonhandicapped children learn and develop many of their primary skills such as self-help skills, oral communication, and appropriate social skills in a rather haphazard fashion outside the formal educational environment. The severely handicapped child, on the other hand, may need additional instruction in a formalized structured environment in order to learn many of the skills other children develop through the normal socialization process.<sup>144</sup> The more handicapped the child, the more traditional educational instruction and services need to be expanded. As one group of professionals stated:

When one talks about curriculum for the severely handicapped child, one talks about a curriculum as comprehensive as life itself. It must not only teach the child to live as effectively as possible in his environment, but must provide the most basic of teaching sequences in self-help, language and motor skills.<sup>145</sup>

On the other hand, children with mild handicapping conditions will require less in the way of additional and different educational services. Just as the ordinary educational curriculum has increasingly emphasized the practical aspects of life, many handicapped children will benefit more from a program emphasizing practical skills needed to live in the community. This can include more attention to prevocational and vocational preparation as well as development of social skills.<sup>146</sup>

In reality, the "additional" and "different" educational services required by handicapped children are different only in degree from those provided children in general. As one commentator notes:

Teaching a child to walk is not functionally different from driver training; both are about mobility. Teaching a child to feed himself is not functionally different from health, hygiene, or home economics. Toilet training is not functionally different from the self-control and self-care taught in health, hygiene, or physical education.<sup>147</sup>

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142. 408 F. Supp. 832 (E.D. Pa. 1976).

143. *Id.* at 835. See also J. WALLIN, *supra* note 10, at 52-53 (Emphasizing that appropriate education consists of individualized services. He states, "the problem is to devise the most effective and the least objectionable means of adapting curricula and educational procedures to meet the individual pupil's present stage of development, conditions, needs, and potentialities, to the end that he may achieve maximum growth, development, and self-realization and maximum social, civic, and occupational adjustment.").

144. See *supra* note 59; Gilhool, *supra* note 53, at 187.

145. Fredericks, Baldwin, Grove, Riggs, Furey & Moore, *Curriculum for the Severely Handicapped*, 12 *Educ. & TRAINING OF THE MENTALLY RETARDED* 316 (Dec. 1977).

146. See ROOS, *supra* note 17, at 51-59.

147. Gilhool, *supra* note 53, at 184-85.

And yet, without such educational services, many handicapped children cannot benefit from public education. Indeed, mere access to the classroom, without more, may be harmful to these children. All children need love, security, recognition, and a sense of belonging. When a handicapped child is placed in a classroom with none of the supportive services required to understand and benefit from the situation, the child will fail and be classified as different and incompetent both by teachers and peers. This environment of rejection can only cause frustration and reinforce negative self-opinion. This situation may give rise to secondary characteristics to the primary handicapping condition, often in the form of acting-out behavior which further impedes the child's ability to learn.<sup>148</sup>

Additional educational services geared to unique needs are even more important when dealing with the most severely handicapped children. Two of the most valued rights in a democratic society are life and liberty.<sup>149</sup> Without specialized services, severely handicapped children risk losing their liberty and, in some cases, their lives. Without appropriate education, custodial institutionalization is required for some children, and they are denied the opportunity to learn basic self-help and danger-avoidance skills, increasing the chances of untimely death.<sup>150</sup>

Thus, the very values at the heart of our democratic philosophy demand an appropriate education for every child, handicapped as well as nonhandicapped. As courts and professionals have recognized, the purpose of education is broad, dictating a wide array of services designed to meet the unique needs of each child. Indeed, the general educational statutes of most states refer to the public educational system's responsibility to address individual needs.<sup>151</sup>

### C. Education and the EAHCA

Congress, following previous case law and professional opinion, adopted a broad definition of education when enacting the EAHCA. This intent is manifested by the Act's language, its legislative history, and court opinions interpreting the Act.

As stated earlier, although the Act requires a free appropriate public education for every handicapped child, Congress did not set out the specific services necessary to constitute such an education. This is consistent with Congress' emphasis on individualized programming throughout the Act. An appropriate education is composed of "special education" and "related services" that are provided in conformity with an individualized education program.<sup>152</sup> The special education component is defined as "specially designed instruction . . . to meet the unique needs of a handicapped child . . . ."<sup>153</sup> This language suggests that the types of instruction necessary under the label of education be expansive enough to meet the wide range of special needs presented by children with handicapping conditions of

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148. See S. SEGAL, *NO CHILD IS INEDUCABLE* 87-88 (1974); S. KIRK & G. JOHNSON, *EDUCATING THE RETARDED CHILD* 324 (1951).

149. U.S. CONST. amend. XIV, § 1.

150. Gilhool, *supra* note 50, at 603.

151. For examples of such state statutes, see Gilhool, *supra* note 53, at 184 n.40.

152. 20 U.S.C. § 1401(a)(18) (1982 & Supp. III 1985).

153. 20 U.S.C. § 1401(a)(16) (1982 & Supp. III 1985).

varying degrees. Likewise, the related services component is very comprehensive. Such services, required under the label of education, can include transportation, psychological services, physical and occupational therapy, recreation, counseling, and social work services.<sup>154</sup> Both components of an appropriate education under the Act demonstrate Congress' broad interpretation of the concept of education.

Congress' expansive view of education is also exemplified by the Act's definition of "handicapped children." Its broad coverage extends to the retarded, hard of hearing and deaf, speech-impaired, visually handicapped, orthopedically impaired, seriously emotionally disturbed, learning disabled, other health impaired, and multihandicapped.<sup>155</sup> This definition can include children who are profoundly retarded, the autistic, the schizophrenic, those suffering from two or more handicapping conditions such as the deaf-blind, and even those who are depressed or who exhibit inappropriate behaviors.<sup>156</sup> Such a wide range of conditions underscores the broad array of services which may be required by the Act under the label of education to meet the various unique needs of children suffering from these conditions.

The legislative history of the Act also exhibits Congress' adoption of a wide-ranging definition of education. Congress believed that by requiring a free appropriate public education, handicapped children would achieve a greater degree of independence, and thus become less dependent upon the state.<sup>157</sup> It was hoped that many handicapped children would achieve total self-sufficiency.<sup>158</sup> To move towards self-sufficiency, many severely handicapped children must begin by learning the most basic of self-help skills such as toileting, dressing, eating, and washing. Other, less severely handicapped children, must master additional life skills such as using public transportation and interacting in a socially acceptable manner in the community. Consequently, Congress viewed educational services as including much more than academic instruction. The educational goal of increased self-sufficiency requires that educational responsibility include a comprehensive range of services.

Nevertheless, decisionmakers at both the administrative and judicial levels disagree on the scope of educational services which must be provided as part of a free

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154. 20 U.S.C. § 1401(a)(17) (1982 & Supp. III 1985). The list of related services contained in the Act's statutory and regulatory language was not intended to be exhaustive. 34 C.F.R. § 300.13 (1987) (comment).

155. According to the Act, handicapped children are those who are "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(a)(1) (Supp. III 1985).

156. 34 C.F.R. § 300.5 (1987).

157. See, e.g., 121 CONG. REC. 19492 (1975) (remarks of Sen. Williams) ("Failure to provide appropriate educational services for all handicapped children results in public agencies and taxpayers spending billions of dollars over the lifetime of these individuals to maintain them as dependents in minimally acceptable lifestyles."); 121 CONG. REC. 19505 (1975) (remarks of Sen. Beall) ("In the case of a handicapped child, our failure to stimulate his or her potential can only lead to despair and dependence on the part of the handicapped individual, and this dependence will inevitably be funded by the American public.").

158. See, e.g., 121 CONG. REC. 19492 (1975) (remarks of Sen. Williams) ("[P]roviding appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds."); 121 CONG. REC. 19504 (1975) (remarks of Sen. Mondale quoting State Senator Jerome Hughes) ("We can easily see that for every child we serve educationally we have developed a more self-sufficient individual who will need fewer state services . . . we have helped an individual become a part of our community."). See also Weiker, *The Need for a Strong Education for All Handicapped Children Act*, 14 CONN. L. REV. 471, 472 (1982) (noting Congress' recognition of the potential productivity of handicapped children).

appropriate public education under the Act.<sup>159</sup> On the other hand, many such decisionmakers have simply taken for granted that, for the handicapped, a wide variety of services must be considered a part of education.

In holding that each child is entitled to receive educational benefit from services under the Act, the United States Supreme Court in *Rowley* stressed the importance of looking at individual needs in formulating the child's educational program.<sup>160</sup> The Court refused to "establish any one test for determining the adequacy of educational benefits,"<sup>161</sup> but noted favorably the congressional intent that handicapped children be enabled to increase their self-sufficiency.<sup>162</sup> Though implying that self-sufficiency would be an appropriate goal for some children,<sup>163</sup> the Court refused to set self-sufficiency as the standard required by the Act for all children. The Court noted that for some mildly handicapped children the goal of self-sufficiency would be inadequate while for some severely handicapped children, it would be overdemanding.<sup>164</sup> This emphasis on individual levels and needs as well as the Court's references to self-sufficiency evidence its view that an appropriate educational program must include a broad range of services.<sup>165</sup>

Other courts have been even more explicit in recognizing the variety of services necessary to meet the individual educational needs of handicapped children. Courts have not hesitated to strike down state policies violating the Act's emphasis on meeting individual needs. For example, the practice of limiting the school year to 180 days has been struck as violating the need of some handicapped children for year-round services.<sup>166</sup> One court, in requiring a twenty-four hour structured program emphasizing training in basic self-help skills for a profoundly retarded multihandicapped child, stated: "[T]he concept of education is necessarily broad with respect to [such persons]."<sup>167</sup> Another court, in addressing the education of the severely emotionally disturbed and the severely and profoundly retarded, stated: "Where basic self-help and social skills such as toilet training, dressing, feeding, and communication are lacking, formal education begins at that point."<sup>168</sup> Likewise, the Sixth

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159. See *supra* note 116.

160. See *supra* note 113.

161. The Court stated:

We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

458 U.S. 176, 202 (1982).

162. *Id.* at 201 n.23.

163. *Id.*

164. *Id.* at 202 n.23.

165. In commenting on the various unique needs presented by different handicapped children, the Court remarked: It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills.

*Id.* at 202.

166. *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1980); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263 (N.D. Ga. 1981).

167. *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 693 (3d Cir. 1981).

168. *Battle v. Pennsylvania*, 629 F.2d 269, 275 (3d Cir. 1980).

Circuit emphasized the acquisition of social skills as education.<sup>169</sup> Indeed, one court deemed a summer enrichment program consisting of such activities as camping, field trips, swimming and other sports, playground and recreational activities, gardening, and work skills training as education for an autistic child.<sup>170</sup>

Courts asked to interpret the "related services" component of a free appropriate public education have also held a number of nontraditional services as part of an appropriate education. The provision of psychotherapy has been held a component of an emotionally disturbed child's educational program.<sup>171</sup> The United States Supreme Court required the provision of clean intermittent catheterization under the related services component of an educational program for a child suffering spina bifida so that she could remain in the public school classroom.<sup>172</sup> Other related services held to constitute "education" under the Act have included transportation to and from school;<sup>173</sup> an air-conditioned classroom for a multihandicapped child who could not adequately regulate his body temperature;<sup>174</sup> and assistance with a tracheotomy tube.<sup>175</sup>

In sum, the Act's unconditional language, its legislative history, and court and administrative opinions requiring a wide variety of both instructional and noninstructional services strongly indicate that Congress intended a very broad view of education when enacting the EAHCA.

#### V. RESIDENTIAL PLACEMENTS: THE ULTIMATE EDUCATIONAL VERSUS NONEDUCATIONAL CONTROVERSY

Despite the wide acceptance of both the zero reject educational model and a broad definition of the concept of education, views continue to vary on the range of services required under the EAHCA. Not surprisingly, the split of authority is most pronounced when very expensive services are at issue. The service giving rise to the most debate and resulting litigation is the residential placement.<sup>176</sup>

A residential placement is one of the most nontraditional and costly services that a school district can be asked to provide under the label "education."<sup>177</sup> These twenty-four hour, highly structured intensive programs are composed not only of an

169. *Ronker v. Walter*, 700 F.2d 1058, 1061 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983).

170. *Birmingham and Lamphere School Dist. v. Superintendent of Pub. Instruction*, 120 Mich. App. 465, 467, 328 N.W.2d 59, 60 (1982).

171. *In re the "A" Family*, 184 Mont. 145, 602 P.2d 157 (1979). *Accord T.G. v. Board of Educ.*, 576 F. Supp. 420 (D.N.J. 1983); *B. v. Cronin*, 542 F. Supp. 102 (N.D. Ill. 1980).

172. *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984). *Accord Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443 (3d Cir. 1981).

173. *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va. 1981). *See also* 20 U.S.C. § 1401(a)(17) (1982 & Supp. III 1985) (transportation expressly stated as a related service).

174. *Espino v. Besteiro*, 520 F. Supp. 905 (S.D. Tex. 1981).

175. *Department of Educ. v. D.*, 531 F. Supp. 517 (D.C. Haw. 1982).

176. This debate has been carried over into scholarly commentary. *See, e.g.,* Mooney & Aronson, *Soloman Revisited: Separating Educational and Other Than Educational Needs in Special Educational Residential Placements*, 14 CONN. L. REV. 531 (1982); Stoppleworth, *Mooney & Aronson Revisited: A Less than Solomon-Like Solution to the Problem of Residential Placement of Handicapped Children*, 15 CONN. L. REV. 757 (1983).

177. *See, e.g.,* *Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 516-17 (6th Cir. 1984) (commenting on residential placement that would cost approximately \$88,000 a year); *Stanger v. Ambach*, 501 F. Supp. 1237, 1241-42 (S.D.N.Y. 1980) (remarking on residential placement that would cost \$53,382 a year).

instructional component,<sup>178</sup> but often include custodial, psychological, medical, social, recreational, and other related services as part of their total package.<sup>179</sup>

The Act's regulatory language contemplates provision of a residential placement as part of an appropriate education.<sup>180</sup> To be eligible, as with any service, a child must first meet the Act's definition of "handicapped."<sup>181</sup> This determination requires the following three-step analysis:

1) It must first be established that a child suffers from one of the eleven broad categories of impairments set forth and defined in the Act and its regulations.<sup>182</sup>

2) Next, it must be shown that the impairment(s) the child suffers from adversely affects the child's educational performance.<sup>183</sup> This requirement is often a source of conflict. Like the concept of education, "educational performance" is not defined by the Act. Some school authorities, wanting to limit their responsibility, argue that "educational performance" is limited to performance within the classroom or, even more narrowly, performance in academic tasks.<sup>184</sup> Advocates for the child are likely to take a much broader view of educational performance with an eye towards functioning in the community.<sup>185</sup>

3) The third step is to demonstrate that special education and related services are needed *because* of the particular impairment(s).<sup>186</sup> There are situations when, although a child could use and benefit from services under the Act, the need arises from circumstances other than the child's impairment. For example, a child who becomes significantly depressed for such a period of time that his educational performance begins to deteriorate qualifies under the first two steps of the above analysis. He suffers from a serious emotional disturbance—one of the impairments listed by the Act<sup>187</sup>—which is adversely affecting his education. Furthermore,

178. The Act expressly states that special education includes "[h]ome instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(a)(16) (1982 & Supp. III 1985). Thus, school districts generally agree to pay for the instructional component of a residential program.

179. See, e.g., *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136, 138 & n.2 (D.D.C. 1979) (describing an educational residential placement).

180. 34 C.F.R. § 300.302 (1987).

181. The Act defines "handicapped children" at 20 U.S.C. § 1401(a)(1) (Supp. III 1985). See *supra* note 155.

182. See U.S.C. § 1401(a)(1) (Supp. III 1985); 34 C.F.R. 300.5 (1987).

183. This requirement arises from the Act's regulatory definition of each impairment. In each definition, the caveat is included that such impairment causes educational problems, 34 C.F.R. §§ 300.5(b)(2), (5), (7)(i), and (9) (1987), or adversely affects educational performance, 34 C.F.R. §§ 300.5(b)(1), (3), (4), (6), (7)(ii), (8), (10), and (11) (1987).

184. See, e.g., *In re Capistrano United School Dist.*, 1984-85 EHLR DEC. 506:106 (SEA Cal. June 7, 1984) (Although all parties agreed the child has significant emotional problems outside of school, he cannot be labelled seriously emotionally disturbed as he has the ability to control his actions and behavior in the classroom for a significant period of time); *In re K.E.*, 1983-84 EHLR DEC. 505:111 (SEA Conn. March 23, 1983) (Although diagnosed as seriously emotionally disturbed by a psychiatrist, child is not handicapped under the Act as his behaviors occur almost exclusively at home and in the community as opposed to the classroom).

185. See, e.g., *In re Long Beach Unified School Dist.*, 1984-85 EHLR DEC. 506:274 (SEA Cal. Nov. 9, 1984) (educational performance does not mean merely academic achievement); *In re Appeal of R.M.*, 1983-84 EHLR DEC. 505:139 (SEA Vt. April 4, 1983) (educational performance includes both independent functioning in school and in society); *Bethel (CT) Bd. of Educ.*, 1980 EHLR OCR/COMPLAINTS LOFS 257:55, 257:56 (OCR Letter of Finding Nov. 27, 1979) ("Educational needs are not defined in purely academic or special education terms but include all significant factors relating to the learning process.").

186. 20 U.S.C. § 1401(a)(1) (Supp. III 1985); 34 C.F.R. § 300.5(a) (1987).

187. 20 U.S.C. § 1401(a)(1) (Supp. III 1985); 34 C.F.R. § 300.5(b)(8)(i)(A)-(E), (ii) (1987) (defining "seriously emotionally disturbed" in part as: "(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance: . . .

(D) A general pervasive mood of unhappiness or depression").



suppose the child's depression is the result of an abusive parent. In this case, the child could certainly benefit from services under the Act such as a residential placement. However, if removal from the parent would, in itself, dissipate the child's depression and correct the corresponding poor educational performance, the child would not meet the third requirement in qualifying as "handicapped" under the above analysis. In this situation, the child does not need special education and related services *because* of his impairment. Instead, the child merely needs removal from an abusive home environment. In such a case, instead of the school district some other public agency, such as the Department of Social Services, should provide the placement.<sup>188</sup>

A child who qualifies as a "handicapped child" under the above three requirements is entitled to services under the Act. However, to be entitled to a residential placement, a fourth requirement contained in the Act's regulations must be satisfied. "If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child."<sup>189</sup>

This regulation seems clear enough; if a child needs to be in a residential program in order to receive benefit from education,<sup>190</sup> the program must be provided by the school district as an educational service in itself. However, the official comment to the regulation has served to thoroughly complicate the issue of residential placement responsibility. The comment states in part that "[t]his requirement applies to placements which are made by public agencies for *educational purposes* . . . ."<sup>191</sup> This one sentence has, in many instances, served to shift the focus of inquiry from the child's need for a residential program in order to benefit from education to the question of whether a particular placement was made predominately for "educational" or "other than educational" reasons. In effect, the comment invites the educational-noneducational debate when determining access to a residential program. Neither the Act nor its regulations contain any express criteria for making this distinction. Indeed, neither the Act nor its regulations contemplate such a dichotomy.

Disputes over responsibility for residential placements are usually motivated by serious financial concerns.<sup>192</sup> Most parents cannot afford to pay for these programs. Likewise, such placements place a heavy, if not impossible, financial burden upon school districts. Often, to avoid residential placement costs, school districts argue

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188. As one court stated, special educational services such as residential placements are not required simply to remedy a poor home setting or to make up for some other deficit not covered by the Act. It is not the responsibility of local officials under the Act to finance foster care as such; other resources must be looked to . . . . Congress did not intend to burden local school committees with providing all social services to all handicapped children.

*Abrahamson v. Hershman*, 701 F.2d 223, 227-28 (1st Cir. 1983). *Accord Ahern v. Keene*, 593 F. Supp. 902 (D. Del. 1984); *In re Handicapped Child*, 1983-84 EHLR DEC. 505:145 (SEA N.Y. Sept. 15, 1983).

189. 34 C.F.R. § 300.302 (1987).

190. Although the regulation states that a residential placement is required under the Act when it is "necessary to provide special education and related services," *Id.* (emphasis added), the Supreme Court in *Rowley* held that a FAPE requires more than the mere provision of services; an appropriate education is one which confers educational benefit upon the child. 458 U.S. 176, 200, 201 (1982).

191. 34 C.F.R. § 300.302 (1987) (comment) (emphasis added).

192. See *Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514, 516-17 (6th Cir. 1984).

that the child in question does not qualify as "handicapped" under the Act. For example, school officials might narrowly define educational performance and maintain the child does not meet the second of the Act's requirements. In addition, school authorities may focus on the comment to the residential placement regulation and argue that such placement, even if required, is necessary primarily for noneducational purposes.<sup>193</sup>

The above arguments have a common denominator: they both have a very restricted view of the scope of educational needs and concomitant responsibilities. The objective behind these arguments is to place the responsibility for a needed residential placement on the parents or another public service agency. However, these other potentially responsible parties will likely, in turn, adopt a much wider view of the concept of education and argue the placement at issue is the responsibility of the school district. Much too often, this administrative cycle results in either a long delay or a complete denial of appropriate services for a very needy child.<sup>194</sup>

Parents faced with this administrative bickering can either attempt to pay for an appropriate placement or invoke the due process procedures of the Act.<sup>195</sup> Once these procedures are invoked, the final arbiter on financial responsibility for a residential placement is an administrative hearing officer or a judge.<sup>196</sup> These decisionmakers have attempted to formulate some principled approaches for determining responsibility for residential placements. However, the approaches implemented thus far have proved unsatisfactory, serving only to foster further disputes.

## VI. APPROACHES USED IN DETERMINING RESIDENTIAL PLACEMENT RESPONSIBILITY

### A. *The Uneducable Approach*

Despite the wholesale acceptance of the zero reject special education model and its incorporation into the EAHCA, some decisionmakers continue to deny educational services on the ground that the handicapped children involved are uneducable. For example, an administrative law judge in New Jersey withheld public school services

193. *See, e.g.*, *Mitchell v. Walter*, 538 F. Supp. 1111, 1115 (S.D. Ohio 1982) (discussing an advisory memorandum from the Ohio Department of Education to local school districts, stating in part:

It is the position of the Ohio Department of Education that it is possible to provide an appropriate educational program for any handicapped child regardless of the severity of the handicap on a day school basis. If 24-hour residential care is required, the need would emerge out of noneducational needs. School districts are therefore advised that they have no obligation to provide 24-hour residential care and are not obligated to pay for such care).

*Riley v. Ambach*, 508 F. Supp. 1222, 1228 (E.D.N.Y. 1980) (discussing Commissioner of Education's policy that school boards need not provide residential placements for learning disabled children); *Wallingford Bd. of Educ. v. State Bd. of Educ.*, 1979-80 EHLR 552:305, 552:309 & n.13 (Conn. Sup. Ct. Jan. 6, 1981) (local school board arguing residential placement for educational purposes is precluded by Connecticut policy which states in part:

Some children must be placed in a private school, hospital, or other institution for medical reasons, for psychiatric or even 24 hour supervision *in addition to their need for special education*. The responsibility of the local board for these children must be quite different than for the children the local board placed to acquire a special education program because the board cannot provide said program.)

552:309 & n.13 (emphasis in original).

194. *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *In re G.H.*, 218 N.W.2d 441 (N.D. 1974).

195. *See Board of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

196. *Id.*

from a severely retarded child because the child did not qualify as educable under the state statutory scheme.<sup>197</sup> Fortunately, responsibility for the Act's requirements was assumed by the Department of Human Services, Division of Mental Retardation, which provided the child with educational services labeled as "habilitation" under state law.<sup>198</sup>

In a recent Illinois due process review, the state hearing officer ruled that a severely brain damaged child did not qualify as handicapped under the Act.<sup>199</sup> The officer held that the impairment rendered the child uneducable and thus the requirement of demonstrating a need for special education and related services because of the impairment was not satisfied.<sup>200</sup> However, the facts of this case were extreme in that the child was in a chronically unresponsive state with no sign of cognitive functioning. Obviously, even the most zealous zero reject advocate would admit that a comatose child is not able to benefit from educational services. Nevertheless, the hearing officer, in disturbing dicta, stated:

It follows that there must be some level of functioning below which no education can occur and none is required under the Education For All Handicapped Children Act . . . . Implicit in their [zero-rejectionists] view of a comatose child is the recognition that somewhere a line must be drawn and that children below that line can not [sic] be educated. Everyone seems to agree that the line is actually somewhat higher than "living, human child."<sup>201</sup>

The above statement demonstrates the still existing attitude that some children cannot qualify as handicapped under the Act because they are simply too handicapped. Not long ago a Virginia federal court in *Matthews v. Campbell*<sup>202</sup> echoed this sentiment in ordering a residential placement for a profoundly retarded child. After noting that neither the Act nor its legislative history contemplates the possibility that some children may be uneducable, the court, in dicta, suggested the possibility of some "reasonable exceptions" to this absolute view.<sup>203</sup>

Fortunately, holdings of uneducability under the Act are extremely rare. The widespread professional, judicial, and congressional acceptance of the zero reject model has served to thwart the assertion of "exceptions" suggested by the *Matthews* court.

### B. The Separate and Balance Approach

Some decisionmakers, in determining financial responsibility for a residential placement, undertake to separate and then balance the needs of the child. This

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197. Board of Educ. of Linden v. A.Z. & L.Z., 1984-85 EHLR DEC. 506:142 (SEA N.J. June 28, 1984).

198. The Act allows for the provision of educational services by other state or local agencies as long as these programs are under the general supervision of the state educational agency. 20 U.S.C. § 1412(6) (1982).

199. 1984-85 EHLR DEC. 506:239 (SEA Ill. Dec. 5, 1984) (name not provided).

200. *Id.*

201. *Id.* at 506:240.

202. 1979-80 EHLR DEC. 551:264 (E.D. Va. July 16, 1979).

203. *Id.* at 551:266 (The court expressed this sentiment while contemplating its options if the residential placement failed to benefit the child.). It is interesting to note that the child, despite profound retardation and other serious impairments, did indeed make substantial progress in the placement. See *Matthews v. Davis*, 742 F.2d 825 (4th Cir. 1984).

approach involves an attempt to separate a child's educational needs from other needs including those commonly referred to as medical, custodial, social, emotional, and behavioral.<sup>204</sup> The next step is to determine which of the needs are most responsible for necessitating the residential placement. If it is adjudged that the child's educational needs are not primarily responsible for the placement, the school district is not obligated under the Act.<sup>205</sup> Either the parents or the public agency having jurisdiction over the needs deemed "primary" is looked to for the provision of the placement.

The "separate and balance" approach is a direct result of the "educational versus noneducational" mindset encouraged by the comment to the Act's regulatory language regarding residential placements. There are a number of problems allocating responsibility for such placements with this approach. It is often, if not always, impossible to neatly draw lines between the various needs of a handicapped child and to assign each a percentage of responsibility for placement. An insistence on this method often forces a limited and categorical view of a handicapped child's problems with a resulting nonrecognition of the actual scope of each need and its interrelation with other needs.

This difficulty with the separate and balance approach is especially evident when decisionmakers attempt to separate out a child's educational needs. Categorization most often results in educational needs being viewed as limited to merely academic or instructional needs. A recent Illinois due process review illustrated this problem.<sup>206</sup> The child suffered from poor impulse control, abusive behavior, self-destructive tendencies, and an inability to interact properly with others. The needs of this seriously emotionally disturbed child were conveniently separated into emotional, behavioral, and educational categories.<sup>207</sup> The possible need for a residential placement was recognized but, because the child was making some academic progress, the hearing officer ruled placement would *not* be for "educational

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204. After extensive review of case law involving handicapped children, it becomes obvious that these labels are often used interchangeably and frequently cover overlapping conditions. Examples of conditions these labels may cover include: Medical—disturbances of such nature and severity that psychiatric intervention, drug intervention, or both, or other related services by a physician are necessary; Emotional—a hostile or distrustful view of others or the world in general; Social—an inability to properly interact with others; Behavioral—inappropriate, aggressive, or violent acting-out behaviors due to emotional insecurities; Custodial—a need for confinement to assure safekeeping.

205. Some state statutory schemes have been interpreted as adopting this approach also. See Mooney & Aronson, *supra* note 176, at 546 & nn.70-71 (discussing six state statutes distinguishing between educational and noneducational needs). Mooney & Aronson support the "separate and balance" approach to determining residential placement responsibility. They go on to argue a "but for" test to determine whether educational or noneducational needs are primary, *i.e.*, "[w]ithout regard for a student's special education needs, would this child be placed in a residential facility because of needs unrelated to the educational process? If the answer is in the affirmative, it is clear that a particular residential placement has not been made for educational reasons . . . ." *Id.* at 552. This approach does not address the difficulty, if not the impossibility, of neatly separating a child's educational needs from other needs. In addition, even assuming such a categorization of needs is possible in a particular case, the authors' "but for" test would allow school districts to abdicate their responsibility under the Act in situations when both the educational and noneducational needs require residential placement. For further criticism of this "but for" approach, see Stoppleworth, *supra* note 176; see also Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477, 506 & n.129 (1982) (discussing CONN. GEN. STAT. 10-76d(e) (1981)).

206. 1983-84 EHLR DEC. 505:230 (SEA III. Jan. 12, 1984) (name not provided).

207. *Id.* at 505:232.

purposes.”<sup>208</sup> The school district was held responsible only for needs directly related to instructional needs or manifested within the regular school day.<sup>209</sup> The hearing officer went on to infer that due to the child’s behavior, he should be the responsibility of juvenile court authorities.<sup>210</sup>

In another due process review, a California hearing officer took the same approach, ruling that a seriously emotionally disturbed child did not qualify as handicapped under the Act.<sup>211</sup> Even though the school district admitted the child had significant emotional problems, because he made some academic progress and his behavior could be controlled within the classroom for significant periods of time, his impairments were deemed not to “adversely affect his educational performance.”<sup>212</sup>

Other decisionmakers implementing the separate and balance approach have limited the educational needs only to problems manifested within the school environment. This reasoning was used by the Delaware district court in *Ahern v. State Board of Education*<sup>213</sup> to deny residential placement under the Act to a multihandicapped child with emotional problems. The child’s emotional problems were displayed through inappropriate behaviors, withdrawal when moderately stressed, wandering from home, talking to strangers, and relating to others inappropriately. After hearing testimony that the child’s behaviors were controlled in the classroom and that she was making some academic progress, the court stated that the child’s emotional problems were “segregable from the learning process” and thus residential placement was not necessary for educational purposes.<sup>214</sup> A similar result was reached in a Connecticut administrative hearing.<sup>215</sup> Although all parties agreed that the child was seriously emotionally disturbed, because his emotional problems were manifested almost exclusively at home and in the community rather than in the classroom, the child was held not to qualify as handicapped under the Act.<sup>216</sup>

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208. *Id.*

209. *Id.*

210. *Id.*

211. *In re Capistrano Unified School Dist.*, 1984-85 EHLR DEC. 506:106 (SEA Cal. June 7, 1984).

212. *Id.* at 506:108. See also *Manchester Bd. of Educ. v. State Bd. of Educ.*, 1980-81 EHLR 552:397 (Conn. Sup. Ct. Apr. 22, 1981) (local school district argued that if academic remediation is possible, despite social, emotional, and behavioral problems, a residential placement is not needed for educational purposes); *In re Ashley M.*, 1984-85 EHLR DEC. 506:149, 506:150-51 (SEA Ga. Oct. 3, 1984) (local school district held not responsible for residential placement for behaviorally disturbed child when child is progressing academically. Such behavior should be dealt with through custody by the Department of Human Resources.); *Vernon Wayne N. v. Austin Indep. School Dist.*, 1983-84 EHLR DEC. 505:134, 505:136 (SEA Tex. Aug. 29, 1983) (Emotionally disturbed, learning disabled child was denied residential placement under the Act. The child rarely attended school due to runaway behavior and when in school was disruptive—but made some academic progress. Even though the child’s emotional disturbance was cause of runaway behavior, the school was held only responsible for providing related services within the classroom to mitigate the impact of the handicap so that the child may receive educational benefit.).

213. 1984-85 EHLR DEC. 556:175 (D. Del. Aug. 31, 1984).

214. *Id.* at 556:182. Sometimes the attenuated attempt to separate educational needs from other needs leads to absurd results. See, e.g., *Papacoda v. Connecticut*, 528 F. Supp. 68, 71 (D. Conn. 1981) (overturning hearing officer’s ruling that a residential placement could not be deemed for educational purposes because it would not have been necessary “but for” the child’s handicap.). See also *In re Handicapped Child*, 1983-84 EHLR DEC. 505:145, 505:145 (SEA N.Y. Sept. 15, 1983) (overturning a local hearing officer’s holding that a residential placement was not necessary for educational purposes because the child’s emotional problems were neither limited to, nor caused by the school environment).

215. *In re K.E.*, 1983-84 EHLR DEC. 505:111 (SEA Conn. March 23, 1983).

216. *Id.* at 505:113.

Cases like these, which limit the breadth of educational needs solely to academic needs or needs displayed within the classroom, flagrantly contradict Congress' view of the scope of education as embodied in the Act. Education certainly includes more than academics. Likewise, educational performance encompasses more than performance within a classroom environment. Such restricted views deny appropriate educational services to those who need them the most. It is natural that the manifestations of emotional disturbance will be reduced in a structured, monitored classroom setting. However, more seriously impaired children will often fail to generalize that controlled behavior and will regress once the structure is removed. To deny these children a twenty-four hour structured educational environment where the learning of appropriate behaviors can be constantly reinforced is to deny such placements to those who most need them.<sup>217</sup> Viewing education as consisting of only academic instruction, and limiting educational performance to performance within the classroom, denies Congress' intent to assist handicapped children in becoming self-sufficient and in learning to function as total human beings within their particular living environments.

In addition, the separate and balance approach often results in an impaired child's needs being only partially addressed. Unlike most educational residential facilities, many residential programs are geared toward addressing only a particular type of need. When a child is referred to such a program because his adjudged primary need is of that type, then that need is dealt with but often at the expense of the child's other needs. For example, as in the Illinois case described above,<sup>218</sup> behaviorally disturbed children are often referred for placements in juvenile correctional institutions because the constraint of their acting-out delinquent behavior is deemed to be their primary need.<sup>219</sup> However, most correctional institutions are not equipped to deal with the emotional or other mental health problems which cause the child's behavior.<sup>220</sup>

Furthermore, the separate and balance approach directly contradicts the Act's regulatory mandate that a residential placement be provided if it is necessary in order

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217. See, e.g., *Gladys J. v. Pearland Indep. School Dist.*, 520 F. Supp. 869, 878 (S.D. Tex. 1981) (The court favorably cites expert testimony, stating: "That Laura J.'s behavioral problems at school do not approach those at home is not surprising. As Dr. Carrie indicated, although expert opinion is hardly necessary, a classroom is a structured setting in which children are constrained into certain behaviors."); *David D. v. Dartmouth*, 1984-85 EHLR DEC. 556:215 (D. Mass. 1984) (ability to generalize behavioral controls learned in the classroom is a special educational goal requiring residential placement) 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1970 (1986).

218. 1983-84 EHLR DEC. 505:230 (SEA III. Jan. 12, 1984) (name not provided).

219. See, e.g., *In re Ashley M.*, 1984-85 EHLR DEC. 506:149, 506:150-51 (SEA Ga. Oct. 3, 1984) (ruling that behaviorally disturbed child's acting-out is primary problem and should be dealt with through custody by Department of Human Resources).

220. While a staff attorney for the Ohio Legal Rights Service, this author witnessed many such situations. In Ohio, the primary need of many emotionally, behaviorally, or emotionally and behaviorally disturbed children was deemed to be a constraint of their delinquent acting-out behaviors. As a result, they were referred to juvenile court where they were adjudged delinquent and placed into residential facilities operated by the Department of Youth Services (DYS). These facilities were designed merely for custodial care and confinement and were ill-equipped to address a child's emotional, behavioral, or other handicapping conditions.

I represented one such child confined by DYS who was deaf and behaviorally disturbed. Upon investigation, I discovered that the staff at the facility could not even communicate with the child as they were not versed in sign language. DYS officials were also upset about this situation. Indeed, they were the ones who requested that I represent the child in finding an "appropriate" residential placement that could address the child's varied needs.

for a child to benefit from education.<sup>221</sup> A child who is determined to have a noneducational primary need may nonetheless require an educational residential placement to benefit from educational services. An emotionally disturbed child who also suffers from an abusive home environment is one example. Although the child's immediate and thus primary need is removal from the home, removal itself may not dissipate the emotional disturbance. In this case, the child may very well require an educational residential placement in order to benefit from educational services. However, under the separate and balance approach the child would be referred to a social service agency for placement "required by noneducational reasons."<sup>222</sup>

### C. *North v. District of Columbia Board of Education and the Intertwined Needs Approach*

Another approach taken by administrative and judicial decisionmakers for determining residential placement responsibility under the Act is the "intertwined needs" approach. This approach also attempts, at least initially, to separate and balance the needs of an impaired child. However, this method goes a step further in that it is willing to admit, at least in some severe cases, that the various needs of a handicapped child are "intertwined" and cannot be neatly separated. When intertwined needs are found, the decisionmaker will not assign responsibility for a residential placement based upon needs which appear primary, but will, instead, take into account the child's entire situation.

The source of this approach is *North v. District of Columbia Board of Education*.<sup>223</sup> In *North*, all parties agreed that a multiple handicapped child who was diagnosed as epileptic with seizures, learning disabled, and seriously emotionally disturbed, required a residential placement. However, school authorities argued that the child's needs were primarily emotional, medical, and social rather than educational. As a result, school officials felt that if the parents were unable or unwilling to provide the placement, the appropriate action would be a neglect proceeding in juvenile court to commit the child to a social service agency. In holding that federal court was the proper forum under the Act,<sup>224</sup> the court rejected the school district's argument stating:

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221. See 34 C.F.R. § 300.302 (1987); See also *supra* note 190 and accompanying text (elaborating on the regulatory requirement).

222. This is a clear example of how the comment to the Act's regulatory provision regarding residential placements (distinguishing between placements made for educational and noneducational purposes) can be cited for support even though the placement violates the regulatory mandate. See Stoppleworth, *supra* note 176, at 760 (offering further criticism of this approach to residential placement responsibility). See also Wegner, *Variations on a Theme—The Concept of Equal Educational Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 169, 173 (1985) (maintaining that when services address both educational needs and those deemed noneducational, the services should nonetheless be required under the Act).

223. 471 F. Supp. 136 (D.D.C. 1979).

224. *Id.* at 141. However, the court was somewhat reluctant in accepting jurisdiction stating that notwithstanding the clear directives of the Act,

[a]s a general proposition, it would seem preferable to have issues of the type involved in this case attended to by social service agencies rather than by the school authorities, and litigated in state and local tribunals rather than in the federal courts. It may well be that these philosophical considerations of federalism and of social service expertise are overcome by the explicit statutory and regulatory provisions [of the Act] . . .

*Id.* at 140.

It may be possible in some situations to ascertain and determine whether the social, emotional, medical, or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them.<sup>225</sup>

Consequently, instead of looking strictly to the child's handicapped-related needs, the court took the child's entire situation into account in determining responsibility for placement. Expert testimony established that the stigma resulting from an adjudication of neglect would further exacerbate the child's emotional problems and interfere with the efforts to reunite the family.<sup>226</sup> The court held that due to the potential dangers of a neglect proceeding, the only appropriate alternative was to order the school district to provide a residential placement.<sup>227</sup> The district was ordered to provide a placement which would meet all the child's needs including academic, psychiatric, psychological, and medical.<sup>228</sup>

However, the "intertwined needs" approach of *North* is also an inappropriate method for determining residential placement responsibility under the Act. Like the separate and balance method, the intertwined needs approach still involves an attempt at categorizing and balancing. This approach does, however, sometimes admit the inseparability of a child's needs at least in cases of the severely handicapped. This progressive step, in effect, collapses the distinction between educational and other needs. Unfortunately, instead of being guided by the Act in assigning placement responsibility in such situations, the decisionmaker uses his own judgment. In *North*, placement by the school district under the Act was deemed necessary by default as the neglect proceeding was potentially harmful.<sup>229</sup> As admirable as this result might be, it opens the door for making placement decisions based on any number of considerations, whether appropriate or not. Such considerations could include mere administrative convenience, financial accessibility, or the number of beds available in a particular program. Consequently, placement could be with an agency ill-equipped to handle a child's total handicapping condition.

In addition, *North's* intertwined needs approach, like the separate and balance approach, ignores the regulatory mandate that the school district provide a residential placement under the Act when necessary for a child to benefit from education.<sup>230</sup> Under the *North* approach, a child could very well be entitled to an educational residential placement but be referred elsewhere due to inappropriate considerations.

Strictly following *North* could also result in a violation of the Act's statutory language. The Act excludes medical services from those services required from the school district as part of an appropriate education.<sup>231</sup> Despite this exclusion, the

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225. *Id.* at 141.

226. *Id.* at 140.

227. *Id.*

228. *Id.* at 142.

229. *Id.* at 140-42.

230. See 34 C.F.R. § 300.302 (1987); see also *supra* note 190 and accompanying text (elaborating on the regulatory requirement).

231. 20 U.S.C. § 1401(a)(17) (1982 & Supp. III 1985) (excepting those medical services used for diagnostic and evaluation purposes).



*North* court, in deeming the child's medical needs as intertwined with his educational needs, ordered the school district to provide medical services as part of the required residential placement program.<sup>232</sup>

D. *Kruelle v. New Castle County School District; Beyond North: The Intertwined Needs with the Educational Link Approach*

Several residential placement cases have followed the *North* lead in abandoning the attempt to separate and balance the needs of severely handicapped children.<sup>233</sup> In *Kruelle v. New Castle County School District*,<sup>234</sup> the Third Circuit was asked to determine residential placement responsibility for Paul Kruelle, a profoundly retarded child also suffering from cerebral palsy and serious emotional problems including choking and vomiting when experiencing moderate stress.<sup>235</sup> All parties agreed that the child required a residential placement. However, school authorities maintained that the necessity for residential placement arose not from educational needs, but from social and emotional problems requiring full-time services which were more in the nature of "parenting" than education.<sup>236</sup>

After unsuccessfully attempting to separate and balance the child's educational, medical, social, and emotional problems, the court favorably cited the *North* opinion in concluding that the child's needs were not severable.<sup>237</sup> However, the *Kruelle* court went beyond *North* by next looking to the Act and asking whether the residential placement was necessary for the child to benefit from education.<sup>238</sup> The court determined that a residential placement was "critical to Paul's ability to learn, for the absence of a structured environment contributes to Paul's choking and vomiting which, in turn, interferes fundamentally with his ability to learn."<sup>239</sup>

232. 471 F. Supp. 136, 142 (D.D.C. 1979).

233. E.g., *Christopher T. v. San Francisco Unified School Dist.*, 553 F. Supp. 1107 (N.D. Cal. 1982); *San Francisco Unified School Dist. v. State*, 131 Cal. App. 3d 54, 182 Cal. Rptr. 525 (1982); *Manchester Bd. of Educ. v. State Bd. of Educ.*, 1980-81 EHLR 552:397 (Conn. Sup. Ct. Apr. 22, 1981); *Wallingford v. State Bd. of Educ.*, 1980-81 EHLR 552:305 (Conn. Sup. Ct. Jan. 6, 1981).

234. 642 F.2d 687 (3d Cir. 1981).

235. The court described the thirteen year old child as having the social skills of a six month old child and [an] I.Q. [of] well below thirty. As found by the district court, "he cannot walk, dress himself, or eat unaided. He is not toilet trained. He does not speak and his receptive communication level is extremely low. In addition to his physical problems, he has a history of emotional problems which result in choking and self-induced vomiting when experiencing stress."

*Id.* at 688-89 (quoting *Kruelle v. Biggs*, 489 F. Supp. 169, 172 (D. Del. 1980)).

236. 642 F.2d 687, 690 (3d Cir. 1981).

237. *Id.* at 693-94.

238. *Id.* at 694 (stating, "[t]he statutory language requires courts to assess the link between the supportive service or educational placement and the child's learning needs.>").

239. *Id.* The *Kruelle* decision was actually presaged by the cryptic opinion in *Erdman v. Connecticut*, 1980-81 EHLR 552:218 (D. Conn. Aug. 27, 1980). In *Erdman*, the court held that it was impossible to separate a seriously emotionally disturbed child's emotional needs from his academic needs when developing his educational program. *Erdman v. Connecticut*, 1980-81 EHLR 552:218, 552:219 (D. Conn. Aug. 27, 1982). However, once needs were determined not severable, the court deviated from the *North* approach by seeking guidance from the Act's regulation on residential placement responsibility rather than from other factors in the child's situation. Because the child could not learn without a twenty-four hour structured environment, the court ordered the Board of Education to provide the placement. *Erdman v. Connecticut*, 1980-81 EHLR 552:218, 552:219 (D. Conn. Aug. 27, 1980).

Only one month later, the *Kruelle* approach was adopted by another federal court in *Papacoda v. Connecticut*.<sup>240</sup> At issue was the placement of an eighteen year old emotionally and behaviorally disturbed child. School officials pointed to family turmoil as a factor contributing to the child's problems in arguing that her needs were primarily emotional, not educational.<sup>241</sup> The court abandoned any attempt to separate the child's various needs. Instead, the court cited *Kruelle* in finding that the child's intertwined needs made it necessary to provide educational services in a therapeutic residential environment where they would be effective.<sup>242</sup>

Decisionmakers in other cases have followed the *Kruelle* approach in determining residential placement responsibility. In *Clevenger v. Oak Ridge School Board*,<sup>243</sup> the Sixth Circuit ordered a residential placement under the Act for an emotionally disturbed nineteen year old. The school board argued that the child's primary needs stemmed from hostile behavior and runaway tendencies that were separate from educational problems. The court, however, found that the behavioral needs were linked to educational needs in that the oppositional behavior constituted the child's main learning problem.<sup>244</sup> As a result, the court held that a secured, locked residential facility was necessary for the child to benefit from education as it would prevent his impulsive running away.<sup>245</sup> Likewise, a Texas hearing officer utilized the *Kruelle* approach in ordering an educational residential placement for a mentally retarded, behaviorally disturbed child.<sup>246</sup> The child's violent aggressive behavior led to intermittent psychiatric hospitalization, too much sleep, and a lack of motivation. These problems resulted in excessive school absences. The hearing officer ordered a therapeutic residential program addressing the behaviors "to the extent necessary to compel her school attendance and consequently, address her educational needs."<sup>247</sup>

The analysis used in *Kruelle* is much closer to the meaning of the Act than that used in *North*. Both approaches admit, at least in some complex cases, that a child's needs, in reality, cannot be severed. However, the *Kruelle* approach looks to the Act in formulating the next question: whether the residential placement is needed in order for the child to benefit from education. If so, the residential program, with all of its attendant services, is required by the Act. Although these services may, in some

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240. 528 F. Supp. 68 (D. Conn. 1981).

241. It should be noted that although the child's emotional disturbance was related to family turmoil, merely removing the child from the home would not have alleviated her condition. *Id.* at 71-72. Had that been the case, she would not have qualified as a "handicapped child" under the Act. See *supra* notes 186-88 and accompanying text.

242. *Id.* at 71-72. The court stated: "This case is not simply one in which the plaintiff must be placed in a facility to be treated solely for reasons of health. She must be placed in such a facility because such treatment is necessary in order to render her educable." *Id.*

243. 744 F.2d 514 (6th Cir. 1984).

244. *Id.* at 516.

245. *Id.*

246. *Sandra S. v. Conroe Indep. School Dist.*, 1983-84 EHLR DEC. 505:281 (SEA Tex. Sept. 5, 1983).

247. *Id.* at 284. *Accord* *Christopher T. v. San Francisco Unified School Dist.*, 553 F. Supp. 1107, 1120 (N.D. Cal. 1982) (court held residential placement a required related service under the Act to address the intertwined needs of two emotionally disturbed children so they could receive benefit from educational programming); *Gladys J. v. Pearland School Dist.*, 520 F. Supp. 869, 875 n.8, 876-78 (S.D. Tex. 1981) (an extensive residential placement program with a behavior modification component was ordered for a multiple-handicapped child with severe language and behavioral impairments symptomatic of childhood schizophrenia. The court deemed placement necessary to address the child's intertwined needs so that she could make some educational progress.).

cases, be geared to addressing a child's emotions or behaviors, they are nonetheless required if addressing such needs is necessary for a child to learn.

Although a large step forward, the *Kruelle* approach still does not fully comport with the congressional intent of the Act. One reason is that this approach still encourages, at least as an initial step, the misguided attempt at separating and balancing a child's needs to determine whether placement is primarily for "educational" or "other than educational" purposes.

In addition, even when the attempt at separating and balancing a child's needs is abandoned and the Act's question—whether a residential placement is needed for a child to benefit from education—is addressed, the *Kruelle* approach still allows an overly restrictive view of what constitutes education.<sup>248</sup> For example, in *Erdman v. Connecticut*<sup>249</sup> the court, while holding that it was impossible to separate a child's emotional needs from his educational needs, nevertheless viewed education merely as progress in academics.<sup>250</sup> Likewise, in *Manchester Board of Education v. State Board of Education*,<sup>251</sup> the Connecticut Superior Court ordered a residential placement under the Act to address intertwined needs because progress in academics was being inhibited.<sup>252</sup> It is entirely possible that a decisionmaker adopting such a restricted view of learning could, even under the *Kruelle* approach, deny residential placement under the Act as long as the child is making some academic progress despite a lack of development in any other area. As demonstrated earlier, such a narrow view of learning is at odds with the broad scope of education embraced by the Act.

On the other hand, a strict adherence to the *Kruelle* approach may demand more from school authorities than the Act contemplates. Although the Act exempts school districts from providing medical services,<sup>253</sup> some courts have required educational residential programs to address medical needs if they impact upon educational progress. For example, in *Clevenger* the Sixth Circuit required the school district to provide psychiatric treatment as part of the ordered educational residential program.<sup>254</sup> Another court went so far as to hold that placement in a psychiatric hospital with all its attendant services was an "educational placement" to be paid for by the school district because the child's medical needs could not be segregated from his educational needs.<sup>255</sup>

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248. However, it should be noted that the *Kruelle* court at least viewed the development of basic self-help skills as education. 642 F.2d 687, 693 (3d Cir. 1981) (stating, "[w]here basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point." (quoting *Battle v. Pennsylvania*, 629 F.2d 269, 275 (3d Cir. 1980)). Accord *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983); see also *Wegner*, *supra* note 222, at 202-04 (agreeing that the need to master basic self-care skills is an educational need).

249. 1980-81 EHLR 552:218 (D. Conn. Aug. 22, 1980).

250. *Id.* at 552:219.

251. 1980-81 EHLR 552:397 (Conn. Sup. Ct. Apr. 22, 1981).

252. *Id.* at 552:398.

253. 20 U.S.C. § 1401(a)(17) (1982 & Supp. III 1985) (excepting those medical services used for diagnostic and evaluation purposes).

254. 744 F.2d 514, 516.

255. *Lunceford v. District of Columbia Bd. of Educ.*, 1983-84 EHLR DEC. 555:201, 555:202 (D.D.C. 1983), *rev'd*, 745 F.2d 1577 (D.C. Cir. 1984).

Such holdings do not comport with the Act's express language that, except for diagnostic and evaluative purposes, medical services are not considered "related services" which must be provided as part of an educational program.<sup>256</sup> Since the exception is otherwise unqualified, it should not matter whether the medical needs impact on the learning process. The Supreme Court supported this view when stating that the Secretary of Education "could reasonably have concluded that [the medical services exception] was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence."<sup>257</sup>

## VII. BEYOND *KRUELLE*: FILLING THE CRACKS IN EDUCATIONAL RESPONSIBILITY

In addition to being out of harmony with congressional intent behind the Act, the above approaches to determining residential placement responsibility have failed to stem the tide of litigation on this issue.<sup>258</sup> Each approach fosters interagency arguments over residential placement eligibility and responsibility. Educational agencies persist in asserting a narrow view of educational needs and responsibilities in order to avoid placement obligations. Parents, advocates, and other public agencies argue a more comprehensive approach in an attempt to hold school authorities responsible.

256. 20 U.S.C. § 1401(a)(17) (1982 & Supp. III 1985).

257. *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883, 892 (1984). Another danger of the *Kruelle* approach is the proclivity to focus too heavily on the question of whether a child needs a residential placement to receive educational benefit rather than undertaking the three-part analysis necessary to determine whether the child qualifies as "handicapped" under the Act.

In *San Francisco Unified School Dist. v. State*, 131 Cal. App. 3d 54, 182 Cal. Rptr. 525 (1982), the court was asked to determine whether an emotionally disturbed child required an educational residential placement. Substantial evidence was introduced into the record establishing that the child's emotional problems were greatly aggravated by an unstable, emotionally charged home environment. 131 Cal. App. 3d at 59, 182 Cal. Rptr. at 529.

The court took the first step in analyzing the child's status as "handicapped" by determining that he suffered from impairments listed by the Act. 131 Cal. App. 3d at 58, 182 Cal. Rptr. at 528. The court then took the second step in the analysis by determining that the child's emotional impairment adversely affected his educational performance. 131 Cal. App. 3d at 70-71, 182 Cal. Rptr. at 535.

The court then compared its case to the facts in *Kruelle* and determined that the child needed a residential placement in order to learn. The court reasoned that in order for the child to make educational progress, he needed to escape his unstable home environment which was a major factor behind his learning problems. 131 Cal. App. 3d at 70-71, 182 Cal. Rptr. at 535. The court, while focusing on whether the child needed a residential placement in order to learn, failed to ask the third question in the determination of whether the child qualified as handicapped under the Act, *i.e.*, whether the residential placement was necessary *because* of the impairments. *See* 20 U.S.C. § 1401(a)(1) (1982 & Supp. III 1985); 34 C.F.R. § 300.5(a) (1987). In this case, although the child required some special educational services, he did not need a residential placement *because* of his emotional impairments. Instead, the child required a residential placement in order to escape an adverse home environment. Once out of this environment, his emotional problems might have subsided to the point where he could have made sufficient educational progress from the special educational services that he was already receiving in school. If this was the case, it is a situation when the appropriate social service agency should have provided the residential placement.

258. *See, e.g.*, *Geis v. Board of Educ.*, 774 F.2d 575 (3d Cir. 1985); *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985); *David D. v. Dartmouth School Comm.*, 775 F.2d 411 (1st Cir. 1985); *Antkowiak v. Ambach*, 621 F. Supp. 975 (W.D.N.Y. 1985); *Tolland Bd. of Educ. v. Connecticut State Bd. of Educ.*, 1984-85 EHLR DEC. 556:412 (D. Conn. May 9, 1985); *Christopher N. v. McDaniel*, 569 F. Supp. 291 (D. Ga. 1983); Case No. SE-68-83, 1984-85 EHLR DEC. 506:195 (SEA Ill. Mar. 6, 1984); Case No. 84-0992, 1984-85 EHLR DEC. 506:344 (SEA Mass. Dec. 5, 1984); Case No. 84-0481, 1984-85 EHLR DEC. 506:155 (SEA Mass. July 10, 1984); Case No. 83-0663, 1984-85 EHLR DEC. 506:160 (SEA Mass. May 1, 1984); Case No. 83-1165, 1984-85 EHLR DEC. 506:298 (SEA N.J. Mar. 15, 1984); Case No. 251, 1984-85 EHLR DEC. 506:346 (SEA Pa. Mar. 14, 1985); Case No. 074-SE-383, 1984-85 EHLR DEC. 506:230 (SEA Tex. Sept. 23, 1983).

Interagency disputes over service provision responsibility are nothing new. Such disputes certainly predate the Act. For example, in 1972 the District of Columbia district court in *Mills v. Board of Education*<sup>259</sup> noted that lack of appropriate educational services to the plaintiff children was the result of lack of communication and cooperation between state agencies.<sup>260</sup> Courts continue to criticize such interagency buck-passing in cases brought under the Act. As one court stated: "It is unfortunate that the assistance of this Court had to be invoked under federal statutes to resolve what essentially are internal bureaucratic disputes."<sup>261</sup> Unfortunately, these approaches, implemented to resolve these disputes, have had the effect of promoting further controversies. Both the delays in the provision of services and placements with agencies ill-equipped to handle the needs presented have had tragic effects on handicapped children. Such buck-passing controversies have even caused some children to fall between the cracks of purported agency responsibility and thus receive no services at all.<sup>262</sup>

These types of disputes and their deleterious effects are precisely what Congress hoped to eliminate by enacting the EAHCA.<sup>263</sup> Under an interpretation of the Act consistent with congressional intent, such disputes would be eliminated. What is required is an approach going one step further than that used by the *Kruelle* court. No

259. 348 F. Supp. 866 (D.D.C. 1972).

260. *Id.* at 876. See also *In re G.H.*, 218 N.W.2d 441 (N.D. 1974) (dispute over payment of services between the Public Welfare Board and the Department of Education).

261. *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136, 141 (D.D.C. 1979). The court went on to state: Since this assistance has been sought, the Court must adjudicate plaintiff's rights and thereby resolve that which the several District of Columbia agencies have been unable or unwilling to decide among themselves; that is, who among them shall pay for plaintiff's residential treatment—treatment which all affected departments appear to agree is both necessary and a responsibility of the District of Columbia Government.

*Id.* See also, e.g., *Kruelle v. Biggs*, 642 F.2d 687, 698 (3d Cir. 1981) ("what this case essentially involves is which agency should pay for Paul's institutionalization. Evidently, the parent's attempt to seek aid under the Education Act has triggered a 'buck-passing' sequence . . ."); *Abrahamson v. Hershman*, 701 F.2d 223, 225 & n.4 (1st Cir. 1983) (noting that state agencies were unable to agree as to which one was responsible for providing child with residential placement).

262. While a staff attorney for the Ohio Legal Rights Service, I encountered a number of situations wherein needy children were denied appropriate public services due to interagency buck-passing. In one case, the distressed parent was forced to place her hearing-impaired, emotionally disturbed child into a private psychiatric hospital even though the child was not mentally ill. The hospital informally agreed to retain the child, hoping that an appropriate public residential placement would be arranged at once.

The child continued to regress as the hospital did not have the appropriate services to address his needs. Indeed, the child started acquiring behaviors characteristic of the other mentally ill patients with whom he was confined. Hospital doctor's evaluations and affidavits verified the child's regression and the inappropriateness of the placement. See Plaintiff's Motion for Preliminary Injunction, *Mitchell v. Walter*, Case No. C-2-81-1202 (S.D. Ohio 1981), *dismissed*, 538 F. Supp. 1111 (S.D. Ohio 1982).

In another case, the desperate father of a multihandicapped, emotionally disturbed child walked to the local courthouse and literally begged the juvenile court judge to assist in forcing public agencies to provide a placement for his child. The judge immediately called our office for representation on behalf of the father and his child.

Each situation necessitated the filing of a lawsuit against the various state agencies to force their cooperation in developing and providing appropriate residential placements. See *McFarland v. Harris*, Case No. 7703 (Ct. of Common Pleas, Juv. Div. Coshocton County, Ohio 1982); *Mitchell v. Walter*, Case No. C-2-81-1202 (S.D. Ohio 1981), *dismissed*, 538 F. Supp. 1111 (S.D. Ohio 1982). Indeed, the *Mitchell* suit resulted in a settlement agreement whereby the Department of Mental Health and the Department of Education combined their efforts and resources in developing and funding a unique residential program for hearing-impaired, emotionally disturbed adolescents. See Consent Order, *In re Impartial Due Process Hearing as to Anthony Mitchell* (SEA Ohio Sept. 1982).

263. See, e.g., SENATE REPORT, *supra* note 5, at 1432; 34 C.F.R. § 300.600 (comment) (1987) (referring to 20 U.S.C. § 1412(6) (1982) and stating in part, "[this section] reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State.").

attempt should be made to separate a child's social, emotional, behavioral, and educational needs to determine which is primary. Likewise, it is inappropriate to focus on whether a child's various intertwined needs impact upon academic or classroom performance. Instead, decisionmakers should acknowledge that social, emotional, behavioral, and other such difficulties, in and of themselves, warrant remedial intervention as educational needs rather than as opposed to or impacting upon educational needs.

This expanded approach to determining service provision responsibility is consistent with, indeed, is required by, Congress' adoption of the zero reject model of special education. As set forth earlier, every handicapped child, regardless of the severity of the handicapping condition, is considered educable under the Act.<sup>264</sup> Congress intended that even the most severely handicapped child should have the opportunity to increase self-sufficiency and independence.<sup>265</sup> Educational intervention for these children must, of necessity, include more than academic training. To attain any further self-sufficiency, these children need training in such areas as basic self-help skills, social interaction skills, and emotional and behavioral control. Thus, such services must be deemed educational.

A necessary concomitant of Congress' adoption of the zero reject education model is its wide view of the concept of education. This perspective includes an expanded approach to determining responsibility for residential placements and other services. As demonstrated earlier, both the Act's express language and its legislative history indicate that Congress agreed with pre-Act judicial and professional views that education be defined in the broad sense. This definition includes training and assistance designed to help children develop as total human beings and function as best they can whatever their living environment.<sup>266</sup> It is obvious that this view of education would include as educational those services geared toward assisting a child to control emotions and behavior and to interact appropriately with others.

It is reemphasized that responsibility under the Act is not limitless. The Act itself establishes its own boundaries. As already explained, a child must meet the Act's definition of handicapped in order to qualify for services.<sup>267</sup> In addition, a child is entitled to only those services listed in his Individualized Education Program.<sup>268</sup> Furthermore, medical services are excluded by the Act.<sup>269</sup>

There have been a few scattered court decisions which, without expressly so stating, have utilized this expanded approach to determine educational service responsibility. In *Capello v. District of Columbia Board of Education*,<sup>270</sup> the court was asked to decide whether a mentally retarded and autistic child was entitled to residential placement under the Act. The child's impairments were characterized by

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264. See *Board of Educ. v. Rowley*, 458 U.S. 176, 191-92 (1982).

265. *Id.*

266. See *supra* notes 161-62 and accompanying text.

267. See 20 U.S.C. § 1401(a)(1) (1982 & Supp. III 1985).

268. See 20 U.S.C. § 1401(a)(18) (1982 & Supp. III 1985).

269. 20 U.S.C. § 1412(a)(17) (1982 & Supp. III 1985) (excepting medical services for diagnostic and evaluation purposes).

270. 1979-80 EHLR 551:500 (D.D.C. Jan. 23, 1980).

a lack of interaction with others, a short attention span, and aggressive behavior which posed a danger to both students and teachers.<sup>271</sup> Although the child had developed rudimentary academic and self-care skills in a day school placement, the court deemed an educational residential placement necessary so the child could also develop self-control, self-awareness, and self-sufficiency.<sup>272</sup> The court relied on expert testimony that established that a "consistent residential education in a calm, rural setting is essential to the child's progress and is the only way to modify his potential as an aggressive, dangerous adult."<sup>273</sup>

In *Bailey v. Unified School District No. 345*,<sup>274</sup> the school district argued that a blind, hearing impaired, and emotionally disturbed child required residential placement despite making advances academically in a day placement.<sup>275</sup> The court held that an educational residential placement was necessary in order to assist the child in maturing and learning to live with his handicaps.<sup>276</sup> Such intervention was necessary, the court said, to alleviate the child's emotional problems, and the court further stated that this intervention was clearly appropriate under the Act.<sup>277</sup> Likewise, in *David D. v. Dartmouth School Committee*,<sup>278</sup> a Down's Syndrome child was held to require an educational residential placement in order to learn internal controls for aggressive and sexually inappropriate behaviors despite the fact that the child demonstrated the ability to exercise such controls within the school setting.<sup>279</sup> The court concluded that the ability to generalize social and behavioral skills acquired in the classroom is an appropriate part of a special educational program so that the child may eventually be able to function in a sheltered workshop setting.<sup>280</sup>

These cases indicate a willingness by a few courts to order residential placements to address social, emotional, and behavioral needs as educational needs in and of themselves. In addition, a survey of administrative decisions under the Act indicates that some hearing officers have taken the same approach. For example, an Illinois hearing officer ordered an educational residential placement for a behaviorally disordered child of seventeen whose impairment was characterized by such unpredictable and dangerous acts as threatening a sibling with a knife, violent assaults, theft, and possession of alcohol.<sup>281</sup> The hearing officer held the behavioral needs as educational, thereby requiring "intensive, highly structured, continually monitored and supervised interventive therapeutic related services in a residential placement to

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271. *Id.* at 551:501.

272. *Id.*

273. *Id.*

274. 233 Kan. 714, 664 P.2d 1379 (1983).

275. *Id.* at 718-20, 664 P.2d at 1383-84.

276. *Id.* at 720, 664 P.2d at 1384.

277. *Id.*

278. 615 F. Supp. 639 (D. Mass. 1984), *aff'd*, 775 F.2d 411 (4th Cir. 1985).

279. *Id.* at 647-48.

280. *Id.* at 647. The court stated:

It concurs with plaintiffs' experts' opinion that the goal of any special education program is to assist the student to maximize the ability to be independent as an adult. In light of this unanimity, defendants' contention that plaintiff's social behavior problems are unrelated to his educational needs must be dismissed.

*Id.* at 647 n.5.

281. Case No. SE-23-83, 1983-84 EHLR DEC. 505:185 (SEA Ill. Sept. 26, 1983) (name not provided).

assure that his needs are served and the rights of other students protected.”<sup>282</sup> Likewise, a California hearing officer ordered an educational residential placement for a deaf child despite the fact that the child was making sufficient academic progress in her day placement.<sup>283</sup> The officer, in stating that education is more than academics, ordered the placement to meet the child’s frustration, problems with impulse control, anxiety, low self-esteem, and other emotional problems.<sup>284</sup>

The decisionmakers in the above judicial and administrative cases did not inquire into whether a child’s emotional, behavioral, and social needs could be separated from educational needs. Nor did they ask whether a child’s intertwined needs impact upon educational progress. Instead, such cases exemplify an implicit recognition that the EAHCA’s zero reject educational policy, and its broad view of the concept of educational, emotional, behavioral, social, and other such needs, require intervention as educational needs in their own right.

This expanded approach to determining service provision responsibility under the Act is not only more consistent with congressional intent, it also serves to eliminate some of the most difficult problems currently confronting administrative and judicial decisionmakers, school authorities, and parents of handicapped children. Hearing officers and judges would no longer be required to attempt the impossible task of separating and balancing a child’s various needs. Inappropriate placements with agencies equipped to address only those needs of a child deemed primary—as opposed to a child’s total realm of needs—would be eliminated. In addition, opportunities for administrative buck-passing through differing interpretations of the scope of educational problems and responsibilities would be reduced by acknowledgment of the broad definition of education. And the corresponding danger of needy children falling through the cracks of purported interagency responsibility and thereby receiving no services at all would be diminished. Furthermore, the increase in expensive and time consuming litigation, fostered by the current approaches to determining service responsibility, would be curbed.

Educational authorities will argue that the adoption of the expanded approach to determining educational service responsibility will saddle already financially strapped school districts with greatly increased fiscal burdens. However, although Congress intended school authorities to be ultimately accountable for lack of appropriate services to handicapped children, they did not intend that school districts be totally responsible for the financial costs of all such services.

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282. *Id.* at 505:187. This case clearly demonstrates the vast difference between this expanded approach and the “separate and balance” approach to determining residential placement responsibility. Under the latter approach, containment of the behaviors would have been deemed as the child’s primary need. Thus, he would have probably been referred to juvenile authorities and confined in a placement unable to address his underlying impairments. *See supra* note 220 and accompanying text.

283. *In re Mt. Diablo Unified School Dist.*, 1984-85 EHLR DEC. 506:108 (SEA Cal. Aug. 24, 1984).

284. *Id.* at 506:110. *See also In re William Q.*, 1984-85 EHLR DEC. 506:344 (SEA Mass. Dec. 5, 1984) (autistic child with serious emotional and behavioral problems awarded residential placement under the Act in order to learn control so that potential for self-sufficiency in a sheltered workshop could be attained). One hearing officer used this expanded approach in ordering a nonacademic summer program for a Down’s Syndrome child. The program was held necessary to address social, emotional, and behavioral needs that were deemed educational in nature. *In re Jay R.*, 1983-84 EHLR DEC. 505:123, 505:125 (SEA Mass. July 8, 1983).



## VIII. LEGAL ACCOUNTABILITY AND FINANCIAL RESPONSIBILITY

Before the passage of the EAHCA, the responsibility for providing the broad range of services it mandates was divided among various state agencies.<sup>285</sup> As each agency has its own area of expertise, the particular type of service a child required usually dictated which agency was responsible.<sup>286</sup> However, this decentralized system of service provision was hallmarked by interagency disputes and, in many cases, a complete lack of appropriate services for needy children.<sup>287</sup>

One of Congress' main objectives in enacting the EAHCA was to eliminate interagency disagreements over service provision responsibility.<sup>288</sup> To accomplish this, Congress deemed it necessary to designate one agency as the overseer of service provisions. As the Senate Report states: "The Committee considers the establishment of single agency responsibility for assuring the right to education of all handicapped children of paramount importance. Without this requirement, there is an abdication of responsibility for the education of handicapped children."<sup>289</sup> Considering its broad view of education, it was natural that Congress designated the state educational agency as the central supervisor.

However, merely because Congress believed single agency accountability would better assure the provision of appropriate services, does not necessarily mean that they intended one agency to assume full financial responsibility for all such services.<sup>290</sup> Congress knew that the federal funds provided the state educational agency through the Act would not be enough to cover all necessary services.<sup>291</sup> The Senate Report explicitly suggests that federal funds received by other state agencies along with local and state funds be used to develop educational services.<sup>292</sup> The state educational agency was appointed merely to ensure that all such services and programs, regardless of the particular agency provider, meet the standards embodied in the EAHCA.<sup>293</sup> As the Senate Report goes on to state:

The Committee bill requires that the State educational agency be responsible for insuring that all requirements of the Act are carried out, and that all educational programs for handicapped children within the State, *including all such programs administered by any other State or local agency*, must meet State educational agency standards and be under the general supervision of persons responsible for education of handicapped children.<sup>294</sup>

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285. See SENATE REPORT, *supra* note 5, at 1448 (stating: "Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered.").

286. See *id.*

287. See *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972).

288. See SENATE REPORT, *supra* note 5, at 1432.

289. See *id.* at 1448.

290. See Note, *Defining the Scope of Residential Placement and Related Services Under the EHA: Difficult Questions Left Unanswered in Illinois—In re Claudia K.*, 32 DEPAUL L. REV. 483, 512-13 (1983) (citing Makuch, *Year-Round Special Educational and Related Services: A State Director's Perspective*, 47 EXCEPTIONAL CHILDREN 272 at 273 (1981) in maintaining that the Act does not require school districts to provide nor finance all necessary services).

291. See SENATE REPORT, *supra* note 5, at 1446 (stating: "The Committee rejects the argument that the Federal Government should only mandate services to handicapped children if, in fact, funds are appropriated in sufficient amounts to cover the full cost of this education.").

292. See *id.* at 1446-47.

293. See *id.* at 1448.

294. See *id.* (emphasis added). See also 20 U.S.C. § 1412(6) (1982) (incorporating this language into the statute).

Congress designated one agency ultimately responsible under the Act to assure adequate supervision and easier accountability. However, Congress did not equate accountability with full financial responsibility. Evidently, Congress assumed that other state agencies would continue to develop, fund, and provide the educational services most related to their particular area of expertise. The Senate Report indicates this assumption in stating that, "while the Committee has provided that the State educational agency is to be the final responsible authority for assuring that all handicapped children have available to them free appropriate public education, it does not intend that state and local educational agencies must be the sole providers of such services."<sup>295</sup> Congress' belief that other state agencies would assist in the provision of special educational services, especially very expensive services such as residential placements, is further emphasized by the Act's regulatory language, stating:

Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.<sup>296</sup>

Unfortunately, Congress' assumption of continued interagency assistance under the Act was, for the most part, ill-founded. Instead, the Act inadvertently gives agencies further incentive for withholding funds from educational services by its ambiguous language regarding the state educational agency's responsibility.

Interagency disputes have been dealt with in a few states by legislation mandating cooperation in the funding and delivery of special educational services.<sup>297</sup> It is not surprising that the complex litigation often arising from such disputes has been virtually eliminated in these jurisdictions.<sup>298</sup> Similar legislation should be adopted in each state.<sup>299</sup> Under such a statutory scheme, the state educational agency could still fulfill its responsibilities under the Act. The educational agency would retain its role as the central supervising agency, overseeing the provision of appropriate services to each eligible child. Parental dissatisfaction would still be directed at educational agency authorities through the Act's due process proce-

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295. See SENATE REPORT, *supra* note 5, at 1446.

296. 34 C.F.R. § 300.301(a) (1987).

297. See Mooney & Aronson, *supra* note 176, at 546 & n.72 (citing such statutes). In February of 1984, after numerous lawsuits, (see, e.g., *supra* note 262) state agencies in Ohio attempted to mandate interagency cooperation through a voluntary contractual agreement between the Departments of Education, Public Welfare, Mental Health, Mental Retardation and Developmental Disabilities, and Youth Services and Health. The contract created the "Interdepartmental Cluster for Services to Youth" (Cluster) made up of representatives from each of the signing agencies. The Cluster was developed to assign and coordinate interagency responsibility for the provision of services to children referred by local/county agencies after existing program options had been exhausted or deemed inappropriate in view of the distinctive nature of the child's situation. See Exhibit 8 to Plaintiff's Motion for Temporary Restraining Order, *Mitchell v. Berry*, Case No. 85-07251 (Ct. Cl. July 1985). Ironically, because the interagency cooperation was not legislatively mandated, the agreement was allowed to expire due to interagency disputes over the terms for its renewal.

298. See Mooney & Aronson, *supra* note 176, at 546 & n.73.

299. See Makuch, *Year-Round Special Educational and Related Services: A State Director's Perspective*, 47 EXCEPTIONAL CHILDREN 274 (1981) (arguing for separate legislation mandating interagency service provisions and funding of various services, including many of those currently listed as "related" under the EAHCA, so that even those not meeting the Act's eligibility requirements will be appropriately served). See also Note, *supra* note 290 at 515 (asserting the need for a legal mandate requiring human service agencies to perform their respective roles).

dures.<sup>300</sup> If additional or substitute services are ruled necessary, they would be funded and provided according to the legislatively mandated cooperative scheme. In this way, congressional intent for "one agency" supervision and accountability would still be met while the often heavy financial burden would be shared.

In addition to eliminating long delays in the provision of appropriate services and the litigation these delays often spur, there would be an additional benefit to mandated interagency cooperation. Agencies that are required to work together in the funding and provision of services, would have a convenient forum for sharing their knowledge and experience in developing particular types of programs. This sharing of expertise can only serve to escalate the quality of services provided.<sup>301</sup>

Out of a lack of awareness or any number of political reasons, state legislatures have not been quick to follow the few states which have required interagency cooperation. The situation may very well demand an amendment to the EAHCA conditioning the receipt of federal funds on the establishment of state interagency cooperative agreements. Such an amendment would certainly be consistent with Congress' intent of assuring the timely provision of appropriate special educational services to the nation's handicapped children. Indeed, it would merely codify what Congress mistakenly assumed would happen voluntarily under the Act.

## IX. CONCLUSION

The Education for All Handicapped Children Act was enacted to assure that every handicapped child receives an appropriate education. Tremendous advances have been made toward this goal since the Act's inception. However, Congress' ambiguous specification of which needs must be addressed as "educational" under the Act has led to complex litigation regarding what services school districts must provide. Ironically, the Act is often used as a justification for denying appropriate services to those who require them the most—the severely handicapped.

The educational–noneducational debate most often arises when expensive nontraditional services like the residential placement are at issue. This Article has reviewed the methods decisionmakers have developed to resolve these disputes and has demonstrated that these approaches foster continued controversy. It is suggested that an expanded approach be adopted by recognizing that handicapped children present a variety of unique needs which transcend the conventional educational–noneducational distinction. The needs of handicapped children, especially those with severe impairments, require a wide array of services not traditionally associated with the education of the nonhandicapped. This Article attempts to demonstrate that Congress intended to collapse the educational–noneducational dichotomy by embracing a broad definition of education in the Act; a definition which, in many cases, includes needs which arise as a result of problems in the social, emotional,

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300. See 20 U.S.C. § 1415(a) (1982).

301. See, e.g., *supra* note 262 (referring to the unique and creative residential program for hearing-impaired, emotionally disturbed adolescents developed by the Ohio Departments of Education and Mental Health pursuant to a consent order).

behavioral, and custodial areas. Through this recognition, Congress hoped to eliminate the interagency buck-passing prevalent in the provision of services to handicapped children.

This Article concluded by suggesting that the educational needs of the handicapped, because they often require innovative and expensive services, can, in many instances, best be met through cooperative undertakings by state human service agencies. These ventures, supervised by the state educational agency under the Act's directives, would include a sharing of professional expertise and financial resources in developing a high quality service provision network. Only then will Congress' laudable goal be met: allowing an equal opportunity for this nation's handicapped children to develop as total human beings in whatever their living environment through the provision of appropriate educational services.